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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SHIRLEY GEE; RYAN JEFFREY GEE; SEAN PAUL FONG, a minor by and through his guardian *ad litem*, Shirley Gee; PATRICIA SETO; SAMANTHA SETO; and COREY SETO,

Petitioners,

v.

SOUTHWEST AIRLINES CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 105 of the Federal Aviation Act, 49 U.S.C. § 41713(b)(1), preempts state laws that are "related to a price, route or service of an air carrier." In *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), this Court held that section 105 does not preempt breach of contract claims arising under state law that are brought by passengers against an airline. The question presented by this petition is:

Does section 105 preempt tort claims arising under state law for negligence, intentional or negligent infliction of emotional distress and the like that are brought by passengers against an airline, on the theory that such claims are "related to" an airline's "service"?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully ask the Court to issue a writ of certiorari for the reasons set forth herein.

OPINIONS BELOW

The opinion of the court of appeals is reported at 110 F.3d 1400 (9th Cir. 1997)(Pet. App. 1-24). The order denying rehearing and rejecting a suggestion of *in banc* review is not reported (Pet. App. 4-5). The opinion of the district court is not reported (Pet. App. 25-37).

JURISDICTION

The court of appeals issued its opinion and judgment on 4 April 1997. By an order dated 28 May 1997, the court denied

a petition for rehearing and rejected a suggestion of rehearing *in banc*.[1] The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

Section 105(a)(1) of the Federal Aviation Act ("section 105") is codified at 49 U.S.C. § 41713(b)(1) and states in relevant part:

> [A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier that may provide air transportation under this subpart.[2]

Petitioners contend that respondent Southwest Airlines Co. violated the following regulations of the Federal Aviation

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[1] The order denying rehearing also made some minor editorial changes in Judge O'Scannlain's concurrence, *i.e.*, making the text after the first sentence of that opinion a new section I and renumbering existing sections I and II as II and III (Pet. App. 4-5). That order was accompanied by what the court termed an "Amended Opinion" that incorporated those changes to the concurrence, but did not alter the opinion of the court. That amended opinion is reproduced in the appendix to this petition (Pet. App. 1-25).

[2] The Federal Aviation Act was recodified in 1994 without substantive change at 49 U.S.C. § 40101 *et seq*. Pub. L. No. 103-272, § 6, 108 Stat. 745, 1378-79. Before then, the Act was codified at 49 U.S.C. App. § 1301 *et seq*. Section 105, which was added by the Airline Deregulation Act of 1978, was codified at 49 U.S.C. App. § 1305 and, as originally enacted, preempted state laws "relating to rates, routes, or services." Because Congress did not intend this wording change to affect the substantive meaning of section 105, the petition will quote this "relating to" and "related to" language interchangeably.

Administration, which appear at 49 C.F.R. § 121.575(b)(1) and (c) (1997):

> (b) No certificate holder may serve any alcoholic beverage to any person aboard any of its aircraft who (1) Appears to be intoxicated;
>
> . . .
>
> (c) No certificate holder may allow any person to board any of its aircraft if that person appears to be intoxicated.

STATEMENT OF THE CASE

A. Material Facts.

Petitioners Shirley Gee, Patricia Seto (her sister) and their four young children are Asian-Americans who were traveling on a Southwest flight from Los Angeles to Oakland on 24 August 1994. Also on the flight was a wedding party of approximately 20 people, some of whom had been consuming alcoholic beverages before the flight (Pet. App. 6).

Petitioners were seated in the six seats comprising row 19, and the wedding party was seated in the three rows in front of them. The group was noisy before entering the aircraft, during take-off and during the flight. Shortly after take-off, Ms. Gee asked them to refrain from making so much noise, and she told a flight attendant that the noise was frightening the children, two of whom were suffering from asthma attacks (Pet. App. 25-26).

The flight attendant checked with his supervisor, who instructed the attendant to "top off" the wedding party's current mixed drinks and otherwise to limit orders to one beer per person. Over Ms. Gee's complaint, the attendant gave one beer apiece to the three people sitting immediately in front of her. One of the passengers sitting in front of Ms. Gee then took her photograph and cursed at her, drawing a reprimand from the attendant (Pet. App. 25-27).

Petitioners alleged that after Ms. Gee complained, mem-

bers of the wedding party responded with a steady stream of "insults, threats, intimidation, profanity, harassment, and racial slurs that continued for the entire flight." For example, their amended complaint alleged that the passenger in front of Ms. Gee called her and her sister "gooks," "bitches" and similar epithets and that another passenger pantomimed cocking a gun and shooting her. Southwest and three individual passengers who were named as defendants denied these allegations (Pet. App. 6).

When the flight landed in Oakland, everyone in the wedding party stayed in their seats, even after the other passengers had deplaned. Petitioners also remained seated (Pet. App. 26-27). Ms. Gee alleged that one member of this group said he was going to "get them" when they deplaned; another was heard saying "let's trip them as they leave the plane . . . remember what we did to those people in Denver?" (Pet. App. 6).

Two police officers boarded the aircraft, and Ms. Gee pointed out three people who had threatened her and other family members and intimidated them with racial epithets. The police detained these individuals, who were later released (Pet. App. 27).

B. Proceedings in the District Court.

Petitioners filed suit against Southwest and certain passengers in California state court. The amended complaint alleged several tort claims against Southwest, including negligence for having served intoxicated passengers, in violation of FAA regulations (*see* pp. 2-3, *supra*); negligent training and supervision of flight attendants; intentional or negligent infliction of emotional distress and violations of California Code provisions protecting people from threats, harassment, intimidation, or assault, including those based on race. Southwest removed the case to the United States District Court for the Northern District of California, citing diversity of citizenship.

Southwest moved for summary judgment, and many of

the facts recited above were stipulated by the parties. Southwest argued that petitioners' claims are preempted by section 105 of the Federal Aviation Act, which preempts state laws that are "related to" an airline's "price, route or service." Southwest's motion relied on a Ninth Circuit case that was issued after this suit had been filed, *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (1995). In *Harris*, an African-American woman alleged that American negligently or intentionally caused her emotional distress by continuing to serve liquor to an intoxicated passenger who was bombarding her with racial slurs. The *Harris* majority deemed the claim preempted, explaining that section 105 preempts claims that are "related to" an airline's "service," and Ms. Harris's claim "pertain[ed] directly to a 'service' the airlines render: the provision of drink," as well as to the crew's in-flight conduct in handling intoxicated passengers. *Id.* at 1476. The dissenting judge argued that this reading of "service" was too expansive and inconsistent with this Court's decision in *American Airlines, Inc. v. Wolens*. *Id.* at 1477-78. The district court in this case deemed itself bound by *Harris* and thus granted summary judgment in favor of Southwest.

C. Proceedings in the Court of Appeals.

Petitioners appealed, and this case was one of four separate airline preemption cases to reach the Ninth Circuit at the same time. Two of them involved personal injuries to passengers, one of whom was hit by a falling suitcase (*Costa v. American Airlines*), and the other was injured when his knee was struck by a metal cart used to pick up waste after in-flight meal and beverage service (*Gadbury v. Delta Air Lines*). The fourth case involved a wheelchair-bound passenger who claimed emotional distress based on her treatment by airline employees during boarding (*Rowley v. American Airlines*).

In each of these cases, the district court concluded that *Harris* controlled and that each passenger's tort claims were

preempted because they "relate[ ] to" an airline "service," either offering alcohol, providing on-board facilities to store luggage, or the airline's practices in boarding passengers.

The cases were consolidated for argument, and the Ninth Circuit issued a single opinion covering all four cases. That court reversed in the two personal injury cases, finding no preemption of those tort claims, but upheld the findings of preemption in this case and the case of the disabled passenger claiming emotional distress.

The majority began by expressing considerable skepticism about the soundness of *Harris* in light of this Court's recent preemption cases, as well as other airline preemption cases in the Ninth Circuit. The court of appeals explained that *Harris* relied heavily on *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), which held that state attorneys general could not use their consumer protection statutes to regulate the content of airline advertising and other marketing practices because those laws plainly "relat[e] to" airline "rates" and are thus preempted by section 105. *Morales* emphasized that Congress enacted section 105 with the identical "relating to" language used in the Employee Retirement Income Security Act of 1974 ("ERISA"); thus, *Morales* reasoned, section 105 should be read broadly with an exception (again borrowed from ERISA cases) for state laws "too tenuous, remote or peripheral" to have preemptive effect (Pet. App. 11, citing 504 U.S. at 390).

The court of appeals cited two post-*Morales* opinions that it viewed as casting doubt on *Harris*'s preemption analysis. The first is *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), which (in the court of appeals' view) "significantly backtracks from the expansive language of *Morales*" by allowing a breach of contract claim to proceed in a case that challenged an airline's retroactive change in the mileage levels that frequent fliers must attain in order to obtain free travel (Pet. App. 11). The court of appeals cited in particular "dicta throughout the *Wolens* opinion

that *Morales* should not be construed so broadly as to preempt personal injury negligence claims, such as those stemming from a plane crash" (Pet. App. 12).

The court of appeals also viewed the theoretical underpinnings of *Harris* as undercut by *New York State Conf. of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995), an ERISA case that the court of appeals read as "essentially reformulat[ing]" this Court's construction of "relating to" in the ERISA cases upon which *Morales* rests. *Travelers* emphasized that the traditional presumption against preemption applies in construing ERISA. No mention of that presumption appears in *Morales*, however, and *Harris* "seems to operate from precisely the opposite position -- that there is a presumption of preemption from which exceptions, such as breach of contract claims, are carved" (Pet. App. 12).

The court of appeals noted that *"Travelers* may have other significant implications for § 105," citing this Court's observation that its prior efforts to construe the phrase "relating to" had not provided "much help drawing the line," and that if this phrase were "taken to extend to the furthest stretch of its indeterminance, then for all practical purposes preemption would never run its course. . . " (Pet. App. 13, quoting *Travelers*, 115 S. Ct. at 1677). The court of appeals also noted *Travelers'* comment that in construing the words "relating to," a court "'must go beyond the unhelpful text . . . and look instead to the objectives of [the statute] as a guide to the scope of the state law that Congress understood would survive'" (*Id.*, quoting 115 S. Ct. at 1677). *Harris*, the court of appeals concluded, "seems to take 'relates to' to the furthest stretch of its indeterminacy." (Pet. App. 13).

Notwithstanding its criticism of *Harris*, the court ended this discussion by noting that it was powerless to overturn a decision by a previous panel, absent an intervening statutory change or Supreme Court decision. "Since *Travelers* is not

directly on point and *Wolens*, while perhaps recharacterizing *Morales*, did not overrule it, we remain bound to apply the *Harris* rationale, however outdated we may find its analysis" (Pet. App. 13).

Turning to the four cases before it, the court of appeals concluded that *Harris* did not preempt the two cases involving personal injury claims, but it did preempt the claims in this case and the other case alleging emotional injury. In reaching this conclusion, the court characterized the claims for emotional injury as claims involving "negligent rendition of service," whereas personal injury claims were characterized as "safety-related personal injury or death claims concerning airline operations or maintenance" (Pet. App. 14). The court saw three reasons for making this distinction.

First, it cited language from the majority, concurring and dissenting opinions in *Wolens* indicating that *Morales* should not be extended to preempt "personal injury safety-related claims" (Pet. App. 14).

Second, the court found support for a distinction between "services" and "operations and maintenance" in 49 U.S.C. § 41112(a), which was enacted as part of the Airline Deregulation Act and required airlines to buy insurance or self-insure in order to pay amounts for which "an air carrier may become liable for bodily injuries to or the death of any person, or for loss of or damage to property of others, relating from the operation or maintenance of aircraft." In the court's view, "*Harris* is reconcilable under this rationale because the insurance requirement pertains only to *bodily* injuries or death, not to emotional injuries such as those involved in *Harris*" (Pet. App. 15)(emphasis in original).

Third, the court of appeals noted that the distinction was "harmonious with results reached in other circuit and district courts," citing four opinions where personal injury claims were allowed to proceed notwithstanding section 105. One of them,

Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995)(*in banc*), is the progenitor of the service/operations distinction adopted by the Ninth Circuit here. In *Hodges*, which involved luggage falling from an overhead bin, the *in banc* Fifth Circuit reversed a panel decision and found no preemption of "state tort actions for personal physical injuries or property damage caused by the operation and maintenance of aircraft." *Id.* at 336.

Judge O'Scannlain filed a special concurrence in which he agreed that the personal injury claims were not preempted and that *Harris* was "contrary to the weight of authority interpreting ADA preemption" (Pet. App. 21). He was critical, however, of the new distinction between airline services and airline operations as relying "on a few words taken out of context" and "needlessly muddl[ing] our preemption jurisprudence" (Pet. App. 21) in a way that will "no doubt yield confusion and conflicting results in the future" (Pet. App. 21).

In his view, the new distinction found no support in *Morales*, *Wolens* or any other authority, and section 105 should be construed in the context of the Airline Deregulation Act, which was enacted to promote competition, with section 105 intended to prevent states from "impos[ing] their own public policies or theories of regulation on the operation of air carriers" (Pet. App. 22, quoting *Wolens*, 513 U.S. at 229 n.5). He thus saw no basis to preempt state tort claims if they can be characterized as relating to airline "services," but not to airline "operations and maintenance."

To buttress this conclusion, he cited this Court's recent decision in *California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 117 S. Ct. 832 (1997), which construed the "relating to" language in ERISA that guided the Court in *Morales*. Judge O'Scannlain pointed to the caveat in *Dillingham* that the words "relating to" in ERISA "should not be applied with 'uncritical literalism,' but with an emphasis on the objectives of the statute and its effect on state

law" (Pet. App. 23, citing *Dillingham*, 117 S. Ct. at 838. He cited too the concurring opinion in *Dillingham* by Justice Scalia, joined by Justice Ginsburg, who argued that it would "greatly assist our function of clarifying the law if we simply acknowledged that our first take on this statute was wrong" and that "relating to" should be read not as a *test* for preemption, but as a means of identifying the *field* being preempted. *Id.* at 843. Thus, in Judge O'Scannlain's view, *Dillingham* rendered the services-vs.-operations test for preemption "archaic" (Pet. App. 23).

Finally, Judge O'Scannlain observed that the distinction between services and operations would be difficult to draw. He noted that in *Hodges*, the majority viewed the falling suitcase claim as plainly relating to airline operations, not services, while two dissenting judges were convinced that the claim related to airline services (Pet. App. 23). Citing a Texas Supreme Court case that also rejected the services-vs.-operations distinction, he observed that a claim by a passenger who was hit by falling luggage would be preempted if the attendant dropped the suitcase, but not if the bin came open because of an improperly maintained latch or because the plane was jolted by turbulent weather. Also, a passenger who fell in the aisle could not recover if he or she slipped on food dropped by a flight attendant, but would have a claim if the accident was caused by a sudden banking of the aircraft (Pet. App. 24).

Judge O'Scannlain concluded that the majority opinion is "no more likely than the *Harris* decision to bring clarity to the airline preemption field" and that the "proper inquiry" under section 105 should be "whether the state common law tort remedies have the effect of frustrating the purpose of deregulation by interfering with the forces of competition. If the state law does not have the requisite regulatory effect, then it is simply 'too tenuous, remote, or peripheral a matter' to have preemptive effect" (Pet. App. 24, quoting *Morales*, 504 U.S. at

378 (internal citation omitted). Rather than continue to draw ever finer lines in this area, he believed that the court of appeals should "set its house in order" (Pet. App. 24).

Petitioners sought rehearing and suggested rehearing *in banc*. Notwithstanding the tensions in the case law and Judge O'Scannlain's plea for clarification, rehearing was denied. No other party to the consolidated cases sought rehearing or has filed for certiorari.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE PREEMPTION OF STATE TORT CLAIMS BY SECTION 105 ON WHICH THE COURTS BELOW HAVE TAKEN DIFFERENT APPROACHES.

Section 105 preempts state laws that are "related to" an airline's "service," and this case presents important issues about both parts of that formulation. The first involves the scope of the word "service" in section 105 and whether Congress intended to recognize the services-vs.-operations dichotomy adopted by the Ninth Circuit here. The second is whether, notwithstanding this Court's heavy reliance on ERISA preemption cases in *Morales*, the court of appeals was correct in determining that this Court's recent ERISA rulings have no bearing on the interpretation of "related to" in section 105. As we discuss below, the court of appeals erred in both parts of the analysis, and review is warranted to clarify the inconsistent ways in which this statute has been construed by the courts below.

A. The Scope of "Services" in Section 105.

This case presents the issue of whether section 105 preempts tort claims for negligence, intentional or negligent infliction of emotional distress and the like that petitioners are asserting against Southwest. The Court has not yet ruled on the extent to which section 105 preempts state tort law (if at all),

and review should be granted to clarify what is perhaps the major outstanding issue left open by this Court's airline preemption cases. Apart from the importance of this question for its own sake, it is an issue on which lower courts have taken different approaches, with the services-vs.-operations distinction adopted by the Ninth Circuit here having been rejected by one state supreme court and a California intermediate court.

Morales did not address preemption of tort claims. *Wolens* acknowledged the airline's concession that section 105 does not preempt "personal injury claims relating to airline operations," such as "a negligence claim arising out of a plane crash," and the Solicitor General likewise deemed it "unlikely that Section 1305(a)(1) preempts safety-related personal-injury claims relating to airline operations." 513 U.S. at 231 n.7 (internal citations omitted). The concurring opinion of Justice Stevens and dissenting opinion of Justice O'Connor expressed the view that at least some common-law negligence claims would not be preempted. *Id.* at 235, 242.

Despite this discussion in *Wolens*, the application of section 105 to tort claims remains unsettled. The Ninth Circuit in *Harris* plainly viewed footnote 7 of *Wolens* as dicta, and *Harris* explained its conclusion that petitioners' tort claims are preempted by asserting that *Wolens* involved only breach of contract claims. 55 F.3d at 1477.

More broadly, the Ninth Circuit's decision to define "service" in a way that excludes claims pertaining to airline operations and maintenance warrants review for a number of reasons.

First, the distinction is inconsistent with *Wolens*, which reasoned that breach of contract claims are not preempted because such claims generally do not reflect an attempt to enforce policy-laden state laws in a manner that comes too close to regulating airline economics or marketing decisions. Footnote 7 of *Wolens* suggests that the same can be said of bodily injury claims involving a plane crash or other accident. If that

is so, it is difficult to see why negligence claims for emotional injury, as opposed to physical injury, are somehow so policy-laden that Congress would want to preempt them. The Ninth Circuit never explained its reasoning on this point, and neither did the Fifth Circuit, which initiated this service-vs.-operations distinction in *Hodges*.

As authority, the Ninth Circuit cited a statute cited in footnote 7 of *Wolens*, 49 U.S.C. § 41112(a)(formerly 49 U.S.C. App. § 1371(q)(1), which was enacted as part of the Airline Deregulation Act and required airlines to obtain insurance (or self-insure) to cover claims "for bodily injuries to or the death of any person, or for loss or damage to property of others, resulting from the *operation or maintenance of aircraft*" (emphasis added). There are several problems with reliance on this statute. In a nutshell, section 41112(a) was a response to a policy argument made against economic deregulation, namely, that it would compromise safety. Congress considered and ultimately rejected that objection. As a precaution, however, Congress enacted this insurance requirement for all licensed carriers, a step that had previously been seen as unnecessary in a regulatory regime that virtually prohibited new air carriers from entering the industry. S. Rep. No. 96-631, 95th Cong., 2d Sess. 97 (1978).

Before section 41112(a) was enacted in 1978, airlines were fully liable to passengers for claims of negligence and other torts, regardless of whether the injury involved physical or other types of injury and regardless of whether the tort related to their "services" or their "operations," however defined. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). *See also* 49 U.S.C. App. § 1506, recodified as 49 U.S.C. § 40120(c)(Federal Aviation Act savings clause preserving "remedies now existing at common law or by statute"). It is difficult to understand why a provision designed to add an element of protection to the flying public should be read as limiting liability in cases such as

this one.

There is related reason why section 41112(a) cannot support a services-vs.-operations distinction. If the Ninth Circuit is correct that footnote 7 of *Wolens* preserves those bodily injury claims that relate to airline "operations," then bodily injury claims that relate to airline "services" are preempted. Thus, if a passenger should contract food poisoning from an in-flight meal, *Harris* would treat that claim as preempted because it relates the airline's meal "service." Indeed, in the falling luggage case that was decided in tandem with this one (*Costa*), American Airlines vigorously urged the Ninth Circuit to find preemption of that bodily injury claim, (Pet. App. 18 n.5), even though American conceded in *Wolens* that claims stemming from a plane crash could proceed.

Whether footnote 7 in *Wolens* should be read to preempt bodily injury claims if they can be categorized as relating to airline "services," rather than airline "operations," is an important issue. Moreover, as American's refusal to concede preemption in *Costa* suggests, it is a claim that will continue to be litigated in future cases. Petitioners do not believe the Court's citation of section 41112(a) in *Wolens* can be read as supporting a services-vs.-operations distinction that would operate in this manner, but whatever the correct reading of *Wolens* may be on this point, the question is surely significant and warrants review.[3]

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[3] Another facet of footnote 7 that could be clarified if review is granted involves the applicability of section 105 to statutory tort claims. *Wolens* drew a distinction between common law contract claims, which were allowed to proceed, and statutory claims involving unfair consumer practices, which were held to be preempted. 513 U.S. at 233. Does this common law/statutory distinction apply to tort claims as well? Although footnote 7 of *Wolens* suggests that tort claims arising out of

(continued...)

This brings us to a second reason why the Court should examine the services-vs.-operations distinction, and that is the fact that it is unworkable and has been rejected by several other courts. As Judge O'Scannlain's concurrence noted, and as the Texas Supreme Court pointed out in *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274 (1996), the line drawn here creates anomalies that Congress could not possibly have intended. Thus, in *Hodges*, another falling luggage case, the Fifth Circuit concluded that this bodily injury claim related to airline "operations" and was therefore preempted, while two dissenting judges viewed the claim as relating to airline "services." 44 F.3d at 343-44 (Higginbotham and E. Garza, JJ., dissenting). Also, the decision below suggests that a passenger who falls in the aisle and is injured would have no claim if the cause was spilled food, but could sue if the cause was the aircraft suddenly banking in one direction (Pet. App. 24).

That a services-vs.-operations distinction will not work in practice is also suggested by two Ninth Circuit cases that the court of appeals cited as being consistent with the decision below. In *Lathigra v. British Airways PLC*, 41 F.3d 535 (9th

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(...continued)
aircraft accidents are not preempted, recoveries for wrongful death are often available only by statute. *E.g.*, CAL. CIV. PROC. CODE § 377.60; ARK. CODE § 16-62-102 OHIO REV. CODE ANN. § 2125.01 (Baldwin 1994); 740 ILL. COMP. STAT. 180/0.01 *et seq.* In the present case, petitioners raised both common law claims and a statutory claim for violating a provision of the California Code that protects people from threats, harassment, intimidation and assault, including those based on race (Pet. App. 6). The court of appeals did not address this claim specifically, though it did hold in *Costa* that the passenger injured by falling luggage could not seek to impose tort liability under a California statute that imposes a higher standard of care than exists under common law principles (Pet. App. 18).

Cir. 1994), the court of appeals found that section 105 did not preempt a tort claim that the airline had behaved negligently when it supposedly reconfirmed a reservation, whereas in fact the flight had been canceled weeks before and the passenger was stranded for several days as a result. Similarly in *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994), the court allowed a bumped passenger to pursue a tort claim for compensatory damages.

It is difficult to square these two cases with the literalist approach of *Harris*. After all, if an airline is not offering a "service" when it makes passenger reservations (*West*) or when it reconfirms those reservations (*Lathigra*), why is the provision of in-flight meals and drink an airline "service"? Why, logically, would Congress expressly intend to preempt one type of claim, but not the other? *Harris* offered no answer, nor did any of the airline defendants below. Indeed, it was this incongruity that prompted Judge O'Scannlain to state that the Ninth Circuit should "set its own house in order" in this area (Pet. App. 24), but petitioners' suggestion of rehearing *in banc* was rejected.

Third, other courts have considered and rejected the services-vs.-operations distinction, thus raising the possibility of inconsistent decisions depending on the forum in which a given case is filed. In *Kiefer*, the Texas Supreme Court disagreed with the Fifth Circuit's decision to adopt this distinction, thus raising the prospect that a case might come out differently if it is litigated in a Texas state court than a Texas federal court.

Similarly, in *Romano v. American Trans Air*, 56 Cal. Rptr. 2d 428 (2d App. Dist. 1996), the court of appeals covering Los Angeles County stated that *Harris* was "wrong" and would not be followed in that jurisdiction. *Id.* at 430. In *Romano*, the plaintiff was harassed throughout the flight by a fellow passenger whom the flight attendants did nothing to control and who ended up punching the plaintiff in the face. The passenger sued the airline for negligence, as well as intentional or negligent

infliction of emotional distress, among other torts.

In allowing these claims to proceed (which were collectively cited as "personal injury" claims, the court making no distinction between "bodily" and "emotional" injuries), the California Court of Appeal conducted a scholarly examination of the case law in this area and concluded that Congress had no intention of preempting "personal injury" claims (broadly defined) when it enacted the Airline Deregulation Act in order to end economic regulation of the industry. *Romano* expressly rejected the argument accepted by the Ninth Circuit here and by Fifth Circuit in *Hodges*, namely, that the only type of tort claims that survive are "those related to operations and maintenance (for example, a wrongful death action arising out of a crash...)." *Id.* at 431 n.6.[4]

There is a paradox here. If petitioners had filed this case in state court in Los Angeles (where their flight originated), and

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[4] Other cases have also reached results inconsistent with the Ninth Circuit's approach here. In *Khan v. American Airlines*, 1994 Ill. App. LEXIS 1167, the court found no preemption of a claim for false imprisonment, malicious prosecution and intentional infliction of emotional distress when a passenger was arrested on suspicion of possessing a stolen ticket. In *Haavistola v. Delta Air Lines, Inc.*, 1997 Del. Super. LEXIS 63, a passenger who was kicked by an intoxicated passenger was allowed to pursue tort claims, the court deciding to follow the Texas Supreme Court's approach in *Kiefer*. Other cases where emotional distress claims were allowed to proceed include *Chrissafis v. Continental Airlines*, 940 F. Supp. 1292 (N.D. Ill. 1996); *Sedigh v. Delta Airlines, Inc.*, 850 F. Supp. 197 (E.D.N.Y. 1994); *Miller v. Northwest Airlines*, 1992 N.J. Super. LEXIS 43, and *Doricent v. American Airlines, Inc.*, 1993 U.S. Dist. LEXIS 15143 (D. Mass.). In addition to this case and *Harris*, preemption of emotional distress claims was found in *Pearson v. Lake Forest Country Day School*, 1994 Ill. App. LEXIS 640.

if they had made the case removal-proof, *Romano* suggests that their claims would have been heard on the merits. Because this case was litigated in federal court, however, and because the Ninth Circuit decided that *Harris* remains the law in that circuit, their claims are preempted. A similar anomaly is possible in Texas, given the Fifth Circuit's decision in *Hodges* to embrace the services-vs.-operations distinction that the Texas Supreme Court rejected in *Kiefer*.

This Court has granted review in preemption cases where there is a direct and irreconcilable conflict between decisions of a state supreme court and the federal circuit court embracing that state. Indeed, *Wolens* was such a case, as was *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). To be sure, *Romano* is an intermediate state court, but its ruling is the law in the second largest metropolitan area in the nation, which is served by all major airlines. The current tension between the law of the Ninth Circuit and of this California state court is unlikely to escape the notice of counsel contemplating where to file tort claims involving an airline in the future.[5]

More generally, many flights involve interstate travel, and thus passengers would understandably have an incentive to seek

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[5] The problems encountered in these cases are not isolated instances. According to a recent press report, airlines are encountering a growing number of rowdy passengers, as well as physical assaults and similar behavior. E. McDowell, *The Arrival of Uncivil Aeronautics: Airlines Must Grapple with Hostile Passengers*, THE NEW YORK TIMES, at D1, col. 2 (30 May 1997). Plaintiffs allege that Southwest violated FAA regulations against serving intoxicated passengers that seek to prevent such incidents. In addition, airlines have procedures designed to discourage passengers from abusive behavior, including an admonition that the carrier will make an unscheduled stop or have the offending passenger arrested when the flight lands. *See Harris*, 55 F.3d at 1476.

out a favorable forum if they know that a tort suit would be preempted if it is filed in the city where their flight departed, but not in the city where their flight arrived. This is an unsatisfactory state of the law in an area where uniformity is important.

B. The Scope of "Relating to" in Section 105.

A second facet of the Question Presented here is the scope of the "relating to" language in section 105. In *Morales*, the seminal decision in this area, the Court noted that this language was identical to language in ERISA's preemption section and that section 105 should be construed in accordance with ERISA preemption principles, citing ERISA cases in which the words "relating to" were read as having an "expansive sweep" and a "breadth" that "is apparent from [its] language." 504 U.S. at 384 (internal citations omitted). The only exception, again following ERISA, was in situations where state actions would affect airline routes, rates or services "'in too tenuous, remote or peripheral a manner' to have preemptive effect." *Id.* at 390, quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 (1983). *Morales* did not pinpoint where that dividing line fell, noting that the states' effort to regulate airline advertising "plainly does not present a borderline question." *Id.* Nor did *Morales* state whether courts should read section 105 in light of the traditional presumption against preemption. *Wolens* followed this analytical model, concluding that breach of contract claims fell within the "too tenuous" exception to be preempted.

Shortly after *Wolens* came down, however, *Travelers* marked a shift in this Court's construction of "relating to" in the ERISA preemption context. Rather than treat these words as having a "breadth that is apparent from [its] language," *Shaw*, 463 U.S. at 96, the Court spoke of the need to "go beyond the unhelpful text" of ERISA's "relating to" language and "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." 115 S. Ct. at 1677.

This shift in emphasis was noted in two cases decided last Term. In *Dillingham*, the Court reiterated *Travelers*' point that "relating to" should not be construed with "uncritical literalism." 117 S. Ct. at 838 (internal citation omitted). And in *DiBuono v. NYSA-ISA Medical and Clinical Services Fund*, 117 S. Ct. 1747 (1997), the Court synthesized this evolution in the case law, explaining that the Court's early ERISA preemption cases (upon which *Morales* relied) had not found it "necessary to rely on the expansive character of ERISA's literal language in order to find preemption because the state laws at issue in those cases had a clear connection with or reference to ERISA benefit plans." *Id.* at 1751 (internal citation omitted). *Travelers*, the Court continued, "confronted directly the question whether ERISA's 'relates to' language was intended to modify 'the starting presumption that Congress does not intend to supplant state law,'" and the Court "unequivocally conclud[ed] that it did not." *Id.* *Travelers* evaluated the state law in question by examining Congress's intention when it enacted ERISA and concluded that state law was not preempted, the same conclusion reached in *Dillingham* and *DiBuono*.

This shift in emphasis is significant. *Morales* stressed the need to read section 105 using the text-based model of this Court's pre-*Travelers* decisions, which assume that the scope of "relating to" is "apparent from [its] language." If review is granted, the Court will be able to provide guidance on whether this shift in emphasis is confined to ERISA cases, or whether the analysis in *Travelers*, *Dillingham* and *DiBuono* applies when courts construe section 105's identical "relating to" language.

This is an important question that the Court should resolve. Petitioners' state law tort claims are directly controlled by *Harris*, in which the Ninth Circuit applied "uncritical literalism" to hold that such claims "relate[] to" the airline's "service" of alcoholic beverages to other passengers. *Harris* explained that section 105 has "an expansive reach" after *Morales*, 55

F.3d at 1474, and nothing in *Wolens* afford petitioners relief.

The case law is thus at a crossroads. Although *Morales* instructed courts to construe section 105 in accordance with ERISA principles, *Harris* and this case adopted an approach that diverges from the approach now required in ERISA cases.

There is another aspect to this "related to" issue where clarification would be important, *i.e.*, whether the traditional presumption against preemption of state law claims applies in construing section 105. *Morales*, again consistent with ERISA preemption cases up to that time, makes no mention of this presumption. The omission is striking, particularly since *Morales* was issued only three weeks before the Court decided *Cipollone*, which held that the presumption does apply in construing a tobacco preemption statute, a ruling that was challenged by the dissent as inconsistent with *Morales*. 505 U.S. at 546 (Scalia, J., dissenting). Although *Travelers* and subsequent cases have made it clear that the presumption against preemption does apply in construing ERISA's preemption section, the Court has not expressly clarified that point in a section 105 context.

The Ninth Circuit's decision here epitomizes the uncertainty in this area, which only this Court can resolve. The opinions below characterized *Harris* as "outdated" and "archaic" in light of *Travelers* and *Dillingham* (Pet. App. 13, 23). Nonetheless, because those were ERISA cases, rather than airline cases, the court of appeals did not view them as directly controlling and so affirmed the judgment that petitioners' tort claims are preempted under *Harris* (Pet. App. 13).

No useful purpose would be served by letting the issue percolate further in state and federal appellate courts. Questions about the scope of section 105 arise in numerous cases each year, and it is doubtful that additional litigation will clarify this issue, which is raised directly by this Court's recent ERISA decisions and which only this Court can ultimately answer.

C. There Is No Reason to Believe that Congress Intended to Preempt State Tort Claims.

The Court has thus far ruled on the application of section 105 to contract claims and efforts by states to enforce consumer protection statutes. Tort cases represent the major remaining category that the Court has not addressed, and a decision by the Court on this issue will significantly reduce the likelihood of future litigation on this topic.[6]

Certiorari papers are not the place to address the merits, but it is our position that section 105 does not preempt state tort claims, both under the analytical approach taken in *Morales* and *Wolens*, as well as the more recent contextual approach followed in *Travelers* and later ERISA cases. The reason is that the airline defendants here, in *Harris* and in all other tort cases, are asking courts to construe section 105 as something it plainly was not intended to be, namely, a "tort reform" statute. The Airline Deregulation Act was enacted to end the public-utility form of regulation that had be applied to the airline industry for the past 40 years, not to eliminate tort liability in cases of airline negligence or misconduct.

Much of the analytical difficulty in this area stems from uncertainty about the scope of the scope of the "service" to which tort claims allegedly "relate." Few decisions have attempted to define what the word "service" means in section 105. For example, the literalist approach embodied in *Harris* assumes that the meaning of "service" is self-evident, while an

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[6] A LEXIS search for tort cases filed against the major airline companies over the past decade turned up literally hundreds of cases, with preemption defenses asserted in a significant number of them. The tort claims asserted in these cases range far and wide, including false arrest, false imprisonment, fraudulent misrepresentation, assault and battery, slander, fraud in the inducement of a contract, and damage to property.

examination of section 105 in the context of the Federal Aviation Act suggests a different approach.

The Federal Aviation Act, to which section 105 was added in 1978, uses the word "service" in various places to denote the type of airline operations being offered, *e.g.*, scheduled passenger "service," charter cargo "service, etc. *E.g.*, 49 U.S.C. § 40102(a)(10); 49 U.S.C. App. § 1374(a). Applying the rule of statutory construction that the same word should generally be given the same meaning throughout a statute, it seems likely that section 105 has nothing to do with preempting state tort law, but sought instead to prevent states from trying to regulate airline operations or "services," no less than their "routes" and "rates." Those are the three major areas that the Civil Aeronautics Board had regulated for the 40 years before 1978, those were the areas being deregulated, and those were the areas the states were being forbidden to enter.

Another source for construing section 105, which also cuts against the notion that section 105 preempts tort law, is a 1979 interpretative statement issued by the CAB several months after the Deregulation Act took effect. The Board there stated that the word "service" denoted that which a passenger received as a *quid pro quo* for his or her fare. 44 Fed. Reg. 9948 (15 February 1979). Under this approach too, tortious behavior is not part of the *quid pro quo* that a passenger expects to receive in return for his or her fare.

We cite these authorities to suggest that the analytical approach approved by the Ninth Circuit here -- a literal and expansive reading of both "related to" and "service" -- has produced anomalous results that are far from what Congress intended. But regardless of what ultimate conclusion may be reached regarding the effect of section 105 on state tort claims, it is apparent that there is currently much confusion and inconsistency in the way that section 105 is being construed, a situation that argues strongly for granting the petition.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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August 1997

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[7] The assistance of Britt Guerrina, a student at the University of Chicago Law School, in the preparation of this petition is gratefully acknowledged.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY GEE; RYAN JEFFREY GEE; SEAN PAUL FONG, a minor by and through his guardian ad litem Shirley Gee; PATRICIA SETO; SAMANTHA SETO; COREY SETO,
Plaintiffs-Appellants,

v.

SOUTHWEST AIRLINES CO., Southwest Airlines Company,
Defendant-Appellee.

No. 95-17175

D.C. No. CV-94-03983-CW

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

HERBERT H. GADBURY,
Plaintiff-Appellant,

v.

DELTA AIRLINES, INC., Foreign Corporation doing business in Oregon,
Defendant-Appellee.

No. 95-36117

D.C. No. CV-95-0336-DCA

Appeal from the United States District Court
for the District of Oregon
Donald C. Ashmanskas, District Judge, Presiding

JAN ROWLEY,
Plaintiff-Appellant,

No. 95-36188

v.

D.C. No.
AMERICAN AIRLINES, INC., CV-94-00433-HJF
Defendant-Appellee.

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

DONNA COSTA,
Plaintiff-Appellant,

No. 95-56278

v.

AMERICAN AIRLINES, INC.; ROE D.C. No.
CORPORATION, Inclusive, CV-94-00660-GLT
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted
October 10, 1996--Pasadena, California

Filed: April 4, 1997

Amended May 28, 1997

Before: Diarmuid F. O'Scannlain, Thomas G. Nelson and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins;
Concurrence by Judge O'Scannlain

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ORDER

The Opinion filed on April 4, 1997, slip op. 3809, is amended as follows:

1. At slip op. 3828, following the first sentence of the concurring opinoin, create a new paragraph starting with "The majority concludes that a distinction between . . . ." On the line above this new paragraph, inset the roman numeral "I" (centered).

2. At slip op. 3830, change "I" to "II"

3. At slip op. 3832, change "II" to "III"

With these amendments, a majority of the panel has voted to deny the petition and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

HAWKINS, Circuit Judge:

In these actions, consolidated for argument, appellants sought damages against various airlines based on in-flight events ranging from loathsome behavior by fellow passengers to objects dropping on them from overhead bins. They appeal summary judgment grants to defendant airlines based on the preemption of the appellants' state tort claims by § 105 of the Federal Aviation Act (commonly referred to as the Airline Deregulation Act and referred to herein as the "ADA").[1] In addition, appellant Rowley also appeals the district court's denial of a motion in limine regarding the availability of punitive damages under the Air Carrier Access Act (the "ACAA"). We affirm the district courts' preemption decisions as to Gee and

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[1] Section 105 of the ADA, as recodified, reads as follows:

> [A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1).

Rowley, but we find that Gadbury's and Costa's tort claims are not preempted, and we therefore reverse and remand to their respective district courts. We also hold that even if punitive damages were available under ACAA, Rowley has not alleged the type of wanton or malicious conduct necessary to support a claim for punitive damages, and we therefore affirm the district court's decision on this issue.

FACTS AND PROCEDURAL HISTORY

A) *Gee v. Southwest Airlines*

On August 22, 1994, Shirley Gee ("Gee") and her fellow Asian-American appellants boarded a Southwest Airlines ("Southwest") flight from Los Angeles to Oakland and sat behind a wedding party (the "Travis group"). The Travis group was noisy, and Gee asked some of the members to stop making so much noise. She also complained to a flight attendant and asked the attendant not to serve the group any more alcohol because they appeared to be intoxicated. Nevertheless, the attendant served one beer apiece to three members of the Travis group. Gee claims that after her complaint, the Travis group harassed her with racial slurs, pantomimed cocking and shooting a gun at Gee and her companions, and threatened to "get them" upon landing.

Appellants filed suit in California state court against Southwest for a variety of tort actions, including negligence per se for violation of FAA regulations against boarding or serving intoxicated passengers; negligence; negligent training and supervision; intentional and negligent infliction of emotional distress; respondeat superior; and violating California Code provisions protecting people from threats, harassment, intimi-dation or assault, including those based on race. Southwest removed the

case to federal court on diversity grounds. The district court granted Southwest's motion for summary judgment on the grounds that the claims were preempted by § 105 of the ADA.

B) *Gadbury v. Delta Air Lines*

Gadbury was a passenger on a 1993 Delta Air Lines, Inc. ("Delta") flight who alleges that during takeoff acceleration and banking, a door on a service cart swung open and struck his knee. Gadbury brought suit in Oregon state court alleging common law negligence, and Delta removed to federal district court. Delta admitted that the door opened after takeoff and that it "was not correctly latched by the flight attendants just prior to takeoff." The district court granted summary judgment for Delta, upholding a magistrate's finding that Gadbury's claim was preempted by § 105 of the ADA.

C) *Rowley v. American Airlines*

Rowley is paralyzed from the chest down and requires a motorized scooter for mobility. Prior to a flight on American in August of 1993, she advised American that she would need an aisle chair (a narrow wheelchair which can be rolled between seats) to assist her in moving from the door of the plane to her seat. American assured her that such assistance would be available. American failed to provide the aisle chair in either Dallas or Portland, in violation of the ACAA. As a result, Rowley claims she was forced to make an arduous journey to and from her seat by holding on to seats and overhead compartments while American employees watched. Rowley also requested American to return her motorized scooter to the door of the plane in Dallas and Portland, but it failed to do so. In Portland, American also failed to reassemble the scooter for her after it had been disassembled for stowage.

Rowley filed suit in district court for compensatory and punitive damages under the ACAA, and asserted several state tort claims for intentional and negligent infliction of emotional distress. The district judge granted American's motion for summary judgment with respect to the tort claims, finding them to be expressly preempted by the ADA. Rowley also filed a motion in limine regarding the availability of damages under the ACAA, and the district court held that "federal law permits recovery of compensatory damages for violation of the ACAA, but not punitive damages."

The remaining compensatory damage claim under the ACAA was tried to a jury, which found that American did violate the ACAA by failing to provide the aisle chair and failing to return the motorized scooter to Rowley. The jury, however, awarded zero compensatory damages. Rowley appeals the summary judgment grant and the pretrial disallowance of Rowley's punitive damage claim.[2]

D) *Costa v. American Airlines*

Costa was a passenger on a 1993 American Airlines ("American") flight who claims injuries from another passenger who opened the overhead bin upon landing, causing a suitcase to fall onto her head. The identity of the other passenger was never discovered, since American, pursuant to its routine policy, destroyed the passenger list 48 hours later. Costa brought suit in California state court against American and the "John Doe" passenger, alleging that American had violated its duty of care

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[2] The district court granted American's motion in limine to prevent the introduction of evidence relating to punitive damages. *See* n.5 *infra*.

as a common carrier under California law, and that American's negligence in the maintenance and operation of the airplane and negligent management caused Costa's injuries. American removed the action to federal court and filed a motion for summary judgment, which the district court granted on the basis that Costa's claims were preempted by the ADA.

DISCUSSION

I. Preemption under the ADA

A. Standard of Review

We review a district court's decision regarding preemption de novo. *Espinal v. Northwest Airlines*, 90 F.3d 1452, 1455 (9th Cir. 1996). A grant of summary judgment is reviewed de novo. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

B. Background

Each district court felt this court's decision in *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995), mandated preemption of appellants' claims. While *Harris* was not the first decision on the scope of ADA preemption, it was the most far-reaching. In *Harris*, an African-American woman sought damages for emotional distress caused by a drunk passenger's racial slurs, claiming American was negligent under state tort law for continuing to serve the inebriated passenger who was harassing her. Harris also sought recovery for intentional infliction of emotional distress and violation of Oregon's Public Accommodation Act. A sharply divided *Harris* court held all of Harris' claims preempted by § 105 of the ADA.

In previous decisions on ADA preemption, we considered

the ADA's goals of airline deregulation or looked to FAA regulations for guidance in determining the scope of preemption. *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994), concerned a damage claim for being "bumped" from a flight. Looking outside the bare preemption language, we held the claim was not preempted since an FAA regulation specifically contemplated that "the passenger may decline the payment and seek to recover damages in a court of law . . .," and thus any other reading would eviscerate the FAA regulation. *Id.* at 152-153. We held, however, that West's right to pursue punitive damages was preempted, since awarding such damages would punish the airline for "accepted forms of price competition and reduction in the deregulation period," which would be contrary to the purposes of the ADA. *Id.* at 152.

Lathigra v. British Airways PLC, 41 F.3d 535 (9th Cir. 1994), involved a tort action for negligent reconfirmation of a reservation. We held the claim was not preempted. *Lathigra* notes that even though there are no FAA regulations discussing remedies for negligent reconfirmation, the case against preemption is "even stronger than that in *West*," as the conduct giving rise to the complaint in no way serves the goals of airline deregulation as overbooking did in *West*. *Id.* at 540.

The *Harris* majority, however, made no such inquiry. Rather, it concluded that Harris' claims "pertain directly to a `service' the airlines render: the provision of drink" and also relate to the crew's in-flight conduct, i.e., how the airlines treat intoxicated passengers. *Harris*, 55 F.3d at 1476. In fact, the *Harris* decision did not even mention the *Lathigra* precedent or attempt to reconcile the seemingly different analysis.

We recognize that *Harris* relied significantly on the

Supreme Court's broad interpretation of the ADA's "relates to" language in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). *Morales* found NAAG guidelines on fare advertising (established through a state's general consumer protection laws) preempted by the ADA because the guidelines "relat[ed] to" airline "rates. " Borrowing heavily from the broad interpretation of the similarly worded preemption provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), *Morales* acknowledged that there would be situations where the state action affecting rates, routes or service would be "too tenuous, remote or peripheral " to have any preemptive effect. *Id.* at 390. The Court, however, declined to express where it would be appropriate to draw the line. *Id.*

Two post-*Morales* Supreme Court decisions suggest that the approach taken in *West* and *Lathigra*, as opposed to *Harris*, is more appropriate. In *American Airlines, Inc. v. Wolens*, 115 S. Ct. 817 (1995), the Supreme Court revisited ADA preemption and held that state law breach of contract claims for retroactive changes in an airline's frequent flyer program are not preempted, even though they "relate to" rates and service. *Wolens* saw these claims as an example of state law affording "recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 824. *Wolens* did, however, find a related state claim based on the Illinois Consumer Fraud and Deceptive Business Practices Act preempted by the ADA, as it involved states "imposing their own substantive standards" with respect to rates, routes or service. *Id.* at 826.

Wolens significantly backtracks from the expansive language of *Morales*. Although *Morales* seemed centered solely on the "relates to" language of the preemption provision, *Wolens* suggests that the outcome of *Morales* also hinged on the belief of the Department of Transportation and Federal Trade Com-

mission that the NAAG guidelines were inconsistent with the ADA's deregulatory purpose, and that the guidelines created "binding requirements" on airlines that would have a significant impact on fares. *Id.* at 821-22. Furthermore, dicta throughout the *Wolens* opinion suggests that the Court was concerned that *Morales* not be construed so broadly as to preempt personal injury negligence claims, such as those stemming from a plane crash. *Id.* at 825 n.7, 827-28, and 830. Finally, in holding that the state law claim for breach of contract was not preempted, the *Wolens* court notes that this outcome "makes sense of Congress' retention of the FAA's savings clause," which preserved the " `remedies now existing at common law or by statute.' " *Id.* at 826 (quoting 49 U.S.C. App. § 1506). *Morales* had characterized the same savings clause as "a relic of the pre-ADA/no preemption regime." 112 S. Ct. at 2037.

Furthermore, in a case decided a mere month before *Harris*, the Supreme Court stressed that interpretation of preemption provisions must start with the presumption that preemption is not intended, noting that in cases "where federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the `assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear manifest purpose of Congress.' " *New York State Conf. of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1676 (1995) (internal citations omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *Harris* seems to operate from precisely the opposite position -- that there is a presumption of preemption from which exceptions, such as breach of contract claims, are carved. 55 F.3d at 1477.

Travelers may have other significant implications for § 105 of the ADA. *Morales* borrows its interpretation of the preemp-

tion clause entirely from a line of ERISA cases that interpreted "identical" relevant language. *Morales*, 112 S. Ct. at 2037. *Travelers*, however, essentially reformulates the approach to this "identical" language. In *Travelers*, a unanimous Supreme Court admitted its prior attempts to construe the phrase "relate to" did "not give us much help drawing the line," noting that "[i]f `relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course . . . ." 115 S. Ct. at 1677. The Court indicated that in interpreting "relate to," a court "must go beyond the unhelpful text . . . and look instead to the objectives of [the statute] as a guide to the scope of the state law that Congress understood would survive." *Id.* It appears that the latter approach is in accordance with our precedent in *West* and *Lathigra*, while *Harris* seems to take "relates to" to the furthest stretch of its indeterminacy.

In this circuit, a panel cannot overturn a decision of a previous panel except by en banc review, unless there has been an intervening statutory change or Supreme Court decision. *United States v. Gay*, 967 F.2d 322, 327 (9th Cir.), *cert. denied*, 113 S. Ct. 359 (1992). Since *Travelers* is not directly on point and *Wolens*, while perhaps recharacterizing *Morales*, did not overrule it, we remain bound to apply the *Harris* rationale, however outdated we may find its analysis.

C. *Gee* and *Rowley*

Gee is virtually identical to *Harris*. Under *Harris*, Gee's negligence claim against Southwest for emotional distress is "related to" the service of alcoholic beverages to passengers and the crew's in-flight conduct towards unruly passengers. Therefore, Gee's claims are preempted under the ADA.

Similarly, Rowley's claim of emotional injury is grounded on the conduct of American employees who failed to provide assistance with her disability. *Harris* established that "the conduct of the flight crew relates to 'service' under the ADA." 55 F.3d at 1476. We find no real distinction between the *Harris* claims based on the "in-flight" conduct of the crew, and Rowley's claims based on the pre- and post-flight conduct of the American employees. If the provision of drink is an airline "service," then the assistance (or lack thereof) in boarding and deplaning passengers is also a service. Under *Harris*, Rowley's attempt to pursue state tort claims involves activities that "relate to" service and are thus preempted. We therefore affirm the decisions of the district courts on this issue with respect to *Rowley* and *Gee*.

D. "Operation and Maintenance" vs. "Negligent Rendition of Service"

The Gadbury and Costa claims, on the other hand, can be distinguished from *Harris*. Emotional injury claims stemming from the "negligent rendition of service " are quite different from safety-related personal injury or death claims concerning airline operations or maintenance. First, we believe the Supreme Court in *Wolens* clearly indicated that *Morales* should not be extended to preempt personal injury safety-related negligence claims, as reflected in the majority, concurring, and dissenting opinions. See *Wolens*, 115 S. Ct. at 825 n.7 ("American does not urge that the ADA preempts personal injury claims relating to airline operations.");[3] *id.* at 827-28 ("Presumably, if an airline were negligent in a way that somehow affected its rates, routes

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[3] In *Costa*, American does urge that personal injury claims are pre-empted.

or services and the victim of the airline's negligence were to sue in state court, the majority would not hold all common-law negligence rules to be preempted by the ADA.") (Stevens, J, concurring); *id.* at 830 ("[a]s the Court recognizes, my view of *Morales* does not mean that personal injury claims against airlines are always preempted.") (O'Connor, J., dissenting).

Secondly, we believe a distinction between "services" and "operations and maintenance" is mandated by a provision that the ADA added in 49 U.S.C. § 1371 (q)(1) (recodified as 49 U.S.C. § 41112(a)). This provision requires airlines to obtain insurance or self-insure in order to pay amounts for which "an air carrier may become liable for bodily injuries to or the death of any person, or for loss of or damage to property of others, resulting from the operation or maintenance of aircraft . . . ."[4] It would make little sense for Congress to require insurance to pay for bodily injury claims if airlines were insulated from such claims by the ADA's preemption provision. As in *West*, we cannot construe the preemption provision in a way that eviscerates complementary regulations or provisions that indicate remedies are available. *Harris* is reconcilable under this rationale because the insurance requirement pertains only to *bodily* injuries or death, not to emotional injuries such as those involved in *Harris*.

Finally, this distinction is harmonious with results reached in other circuit and district courts. *See, e.g., Hodges v. Delta*

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[4] There is also a regulation that requires airlines to give passengers written notice of the time period within which they may bring an action against the carrier for its acts, and any limitations on the amount of liability of a carrier. 14 C.F.R. § 253.5(b)(2)(1994). Again, this regulation would be meaningless if such actions were preempted by the ADA.

Airlines, 44 F.3d 334 (5th Cir. 1995) (tort claim arising from luggage falling from overhead bin found to be related to the safe operation of a flight); *Smith v. America West Airlines, Inc.*, 44 F.3d 344 (5th Cir. 1995) (tort claim for negligent boarding of hijacker found to be "safety" related and not preempted); *Stagl v. Delta Air Lines, Inc.*, 849 F. Supp. 179 (E.D.N.Y. 1994) (no preemption of state common law cause of action for injuries incurred near baggage carousel), *rev'd on other grounds*, 52 F.3d 463 (2d Cir. 1995); *In re Air Disaster*, 819 F. Supp. 1352 (E.D. Mich. 1993) (finding preemption provisions do not apply to state negligence action based on injuries suffered in crash).

E. *Gadbury and Costa*

Having decided to distinguish between claims relating to service and those pertaining to the operation and maintenance of the aircraft, we must now determine where the Gadbury and Costa claims fall. The ADA defines "operation of the aircraft" as "the use of aircraft, for the purpose of air navigation and includes the navigation of the aircraft. " 49 U.S.C. § 40102(a)(32). "Service" is not defined in the act itself, and the Supreme Court has not attempted to define the scope of the term. We agree with the Fifth Circuit that there is no strict dichotomy between "operations and maintenance " and "service." *Hodges*, 44 F.3d at 339. Indeed, it is difficult to imagine a more critical airline service than aircraft navigation. As noted above, there is a presumption *against* preemption, especially absent the clear intention of Congress to preempt fields of traditional state regulation. *Travelers*, 115 S. Ct. at 1676. Given this presumption, a claim fairly characterized as relating both to "service" and "operations" should not lead to preemption.

In *Gadbury*, Delta agrees that the service/operations distinction may be appropriate, but argues that Gadbury's claim

is still preempted because it is more related to "service." Delta argues that Gadbury was injured by a "serving" cart, and the primary purpose of the cart is to provide on-board services, such as waste collection, to passengers. Delta's rationale would lead to absurd results: if Gadbury had been injured by a loose piece of safety equipment, rather than a loose piece of serving equipment, presumably Delta would admit the claim could proceed. Gadbury's claim stems from Delta's negligence in failing to properly latch the door during takeoff. We find that Gadbury's claim does not relate to airline "service" but rather is connected with the failure to take appropriate safety measures relating to the operation of the aircraft. Therefore, the claim is not preempted by the ADA, and we reverse and remand No. 95-36117 to the district court for further proceedings.

Costa's common law tort claims stem from her personal injury when luggage fell onto her from the overhead compartment. We agree with the Fifth Circuit's opinion in *Hodges*, which found that "whether luggage may be placed in overhead bins and whether the flight attendants properly monitor compliance with overhead rack regulations are matters that pertain to the safe operation of a flight," and thus are not preempted. 44 F.3d at 339.

Costa also makes a claim for negligent spoliation of evidence, based on American's destruction of passenger lists despite its notice of the incident. Although *Harris* interpreted "service" broadly enough to encompass the accoutrements of air travel, such as provision of food and drink, we are not persuaded that maintaining passenger lists is a "service" typically provided to passengers. Thus, this is not a claim that relates to "service" within the meaning of the ADA and is not preempted.

Many of Costa's claims pertain to violations of California

civil code provisions that impose a higher duty of care on common carriers. The higher duty necessarily pertains to every action the airline takes. These are not laws of "general applicability" that happen to indirectly relate to airline service. *Cf. Medtronic v. Lohr*, 116 S. Ct. 2240, 2257 (1996). We believe this statutorily imposed standard of care, like the NAAG guidelines in *Morales* or the Consumer Fraud Act action in *Wolens*, is an attempt by California to impose its own substantive standards on airlines.[5] We therefore find the civil code standard of care preempted by the ADA. Thus, even though Costa's tort claims may proceed, they should be evaluated under the common law standard of care. We reverse and remand No. 95-56278 for further proceedings.

II. Punitive Damages and the ACAA

A. Standard of Review

A district court's ruling on a motion which has the effect of dismissing a claim based on interpretation of a federal statute is reviewed de novo. *United States v. Bahena-Cardenas*, 70 F.3d 1071, 1072 (9th Cir. 1995).

B. Punitive Damages

Enacted in 1986, ACAA is utterly silent on the range of available remedies. The district court held that ACAA contains an implied right to compensatory damages, a decision from which American does not appeal. Rowley urges us to go one

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[5] We also note the dicta in *Wolens* suggesting that personal injury claims are not preempted does not address statutory tort claims. 115 S. Ct. at 825 n.7, 827-28, 830.

step farther and find an implied right to punitive damages as well. However, we need not reach the issue: we agree with American that even if punitive damages were available as a matter of law under ACAA, Rowley does not allege on these facts the type of wanton or malicious conduct that is required to recover punitive damages. *See, e.g., Shinault v. American Airlines, Inc.*, 936 F.2d 796, 805 (5th Cir. 1991) (quadriplegic passenger denied right to board plane due to a time constraint); *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566, 571-72 (8th Cir. 1989) (minor with cerebral palsy denied the right to fly unaccompanied). Under former Section 404 of the Federal Aviation Act, we confined the availability of punitive damages to discrimination inflicted "wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations." *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1412 (9th Cir. 1984) (quoting *Archibald v. Pan American World Airways, Inc.*, 460 F.2d 14, 16 (9th Cir. 1972)).

Rowley claims that American failed to provide her an aisle chair on four occasions and twice failed to return her motorized scooter to her at the plane. As a result of American's ACAA violations, Rowley alleges she had to walk (Rowley is ambulatory with concentration), by holding onto seat backs and overhead compartments, approximately ten feet to and from her seat. Rowley claims that no crewmember offered to help her, although one employee did offer her a glass of water and another told her that what she was holding onto was unstable. While American's conduct was regrettable and in violation of ACAA, it simply does not rise to the level of wanton or mali-

cious conduct that could support punitive damages.[6] We therefore affirm the decision of the district court on this issue.

Therefore, the decisions of the district courts in *Gee* and *Rowley* are AFFIRMED, and the decisions of the district courts in *Gadbury* and *Costa* are REVERSED.

O'SCANNLAIN, Circuit Judge, specially concurring:

I concur in the results reached in Part I but write separately to express misgivings about the court's preemption analysis under the Airline Deregulation Act ("ADA"); I concur in Part II without reservation.

I

The majority concludes that a distinction between "services" and "operations and maintenance" is mandated by a provision which Congress added to the ADA in 49 U.S.C. § 1371 (q)(1) (recodified as 49 U.S.C. § 41112(a)). In light of this statutory provision and this court's decision in *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995), the majority constructs a seemingly simple rule: while the regulation of "services" is preempted by the ADA, the regulation of "operations and maintenance" is not. Although this rule is consistent with the result reached by the only federal appellate court to have yet addressed this issue, *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (en banc), I regret that the

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[6] In fact, although the jury found American had violated ACAA, the jury did not even find Rowley to be deserving of *compensatory* damages.

rule's emphasis on a few words taken out of context needlessly muddles our preemption jurisprudence.[1]

I agree with the majority that the *Harris* decision is contrary to the weight of authority interpreting ADA preemption; nonetheless, this court is bound by the *Harris* holding that a common law negligence action constitutes a state's enactment or enforcement of a law, and is therefore preempted if it relates to the "price, route, or service of an air carrier." However, this court is not bound by the *Hodges* distinction that actions preempted because they "related to services" did not include "state tort actions for personal physical injuries or property damage caused by the *operation and maintenance* of aircraft." *Hodges*, 44 F.3d at 336 (emphasis added). The Fifth Circuit's distinction between services and operations is problematic.

Because the majority's rule will no doubt yield confusing and conflicting results in the future, I write separately to emphasize that the only proper framework for evaluating

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[1] See *Romano v. American Trans Air*, 56 Cal. Rptr. 2d 428 (2d App. Dist. 1996) ("[F]ocus on a few words taken out of context may lead to anomalous results, and it is our view that a more thoughtful, less quixotic rule emerges when the analytical framework is placed on the foundation of Congressional intent. This way, we do not parse the language of the statute but consider the economic motivation behind the ADA and look to whether the plaintiff's claim is `related to a price, route or service.' From this perspective, we see that where the airlines have a legitimate interest to protect (the right to advertise their rates, set their routes, determine whether to provide food service on a particular flight), the states cannot interfere. But where there is no legitimate interest needing protection --as is the case when the issue is negligence -- there is no preemption.") (internal citations omitted).

preemption claims is Congressional intent. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding that the purpose of Congress is the "ultimate touchstone " of the preemption analysis).

II

The majority's distinction between airline services and aircraft operations and maintenance is misguided for two reasons. First, it is not supported by the Supreme Court's two airline preemption cases: *American Airlines, Inc. v. Wolens*, 115 S. Ct. 817 (1995) and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). In *Wolens*, the Supreme Court concluded that courts confronting this issue must determine whether the particular tort claims would interfere with the purpose of the ADA. The purpose of the statute, which includes § 1305(a)(1), was to "promote maximum reliance on competitive market forces,' " *Wolens*, 115 S. Ct. at 824 (quoting *Morales*, 504 U.S. at 378), and § 1305(a)(1) itself was intended to ensure that states did not re-impose public utility-style regulation on airlines. Indeed, Congress enacted the ADA "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Wolens*, 115 S. Ct. at 821 (quoting *Morales*, 504 U.S. at 378). Section 1305(a)(1) prohibits states from "impos[ing] their own public policies or theories of regulation on the operation of air carriers." *Id.* at 824 n.5 (quoting brief of United States as *amicus curiae*). I do not read these two cases to suggest that a state common law tort claim is preempted if it is related to airline services, but it is not preempted if it is related to aircraft operations or maintenance.

In *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 117 S. Ct. 832 (1997), the Supreme Court construed the scope of the "relating to" lan-

guage in ERISA's preemption provision, to which the Supreme Court looked for guidance in interpreting section 105 in *Morales*. In finding no preemption of a state law mandating prevailing wages for apprentice employees, *Dillingham* unanimously emphasized that the words "relating to" should not be applied with "uncritical literalism," but with an emphasis on the objectives of the statute and its effect on state law. *Id.* at 838 (internal citation omitted). Of note is a concurring opinion by Justice Scalia (the author of *Morales*), who was joined by Justice Ginsburg (the author of *Wolens*). After citing statements from earlier decisions to the effect that ERISA's "relating to" language has an expansive sweep, Justice Scalia wrote that it would "greatly assist our function of clarifying the law if we simply acknowledged that our first take on this statute was wrong." *Id.* at 843. In his view, "the `relate to' clause of the pre-emption provision is meant, not to set forth a *test* for pre-emption, but rather to identify the field in which ordinary *field pre-emption* applies -- namely, the field of laws regulating `employee benefit plan[s]' " described in ERISA. *Id.* (emphasis in original). In light of the Supreme Court's preemption analysis in this recent case, this court's (and the Fifth Circuit's) *test* for airline preemption is archaic.

Second, a distinction between airline services and aircraft operations and maintenance is difficult to draw. For instance, the majority in *Hodges* had no difficulty viewing Hodges' claim as related to operations rather than services, while two dissenting judges concluded that the opposite view was equally clear. Because the ADA offers no definition for the term "services," courts are left to decide whether providing alcoholic beverages to intoxicated persons or warning passengers of the dangers of items falling from overhead compartments are related to an airline's "services" or "operations." As many an amateur philosopher has observed, everything is at least theoretically related to

everything else."For example, a damage claim by an airplane passenger hit by an article falling from an overhead bin would be preempted if the flight attendant dropped the article but not if the bin came open because of a latch that had not been properly maintained, or because the plane was jolted by turbulent weather. An airplane passenger who fell in an aisle would be prohibited from suing if the accident occurred when the passenger slipped on food dropped by a flight attendant, but not if the accident was caused by a sudden banking of the plane." *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 284 (Tex. Sup. Ct. 1996). I can find nothing in the history of the ADA or in *Morales* and *Wolens* to suggest that Congress intended such a hodgepodge of results.

III

Today's opinion is no more likely than the *Harris* decision to bring clarity to the airline preemption field. We can avoid anomalous results, however, if the analytical framework rests on the regulatory effect of the state tort claim. The proper inquiry then is whether the state common law tort remedies have the effect of frustrating the purpose of deregulation by interfering with the forces of competition. If the state law does not have the requisite regulatory effect, then it is simply "'too tenuous, remote, or peripheral a matter' to have pre-emptive effect." *Morales*, 504 U.S. at 378.

Because we should have set our own house in order, I decline to embrace the majority's distinction between airline services and aircraft operations and maintenance.

FILED OCT 31, 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHIRLEY GEE, et al.,

Plaintiffs,

v.

SOUTHWEST AIRLINES CO., ROGER TRAVIS, JAMES SCALES, and CARLY TRAVIS, and Does 1 through 50, inclusive,

Defendants.

No. C 94-03983 CW

ORDER GRANTING SOUTHWEST AIRLINE CO.'S MOTION FOR SUMMARY JUDGMENT

BACKGROUND

The parties have submitted a Stipulated Separate Statement of Undisputed Facts for the purposes of this motion for summary judgment. The undisputed facts are as follows:

On August 22, 1994, Plaintiffs Shirley Gee and her two minor sons, Ryan Gee and Sean Fong, Patricia Seto and her minor children, Samantha Seto and Corey Seto, traveled from Los Angeles to Oakland aboard Southwest Airlines Flight 824. Defendants James Scales, Roger Travis, and Mr. Travis' minor

daughter Carly Travis were also travelling aboard Flight 824. James Scales and Roger and Carly Travis were travelling as part of a larger group of approximately 20 people. Some members of Defendants' group had consumed alcoholic beverages prior to boarding the aircraft.

Members of Defendant's group were seated in several rows, either alongside or immediately in front of Plaintiffs. The group was loud prior to entering the aircraft, during takeoff, and during the flight. During takeoff, Ms. Gee asked some members of the group to refrain from making so much noise. Several minutes after takeoff, Ms. Gee informed John Owens, a flight attendant, that the noise was frightening the children in her party and that two of the children were suffering from asthma attacks.

Mr. Owens informed the senior flight attendant, Cat Sullivan, of a potential problem involving rowdy passengers. Mr. Owens then asked Ms. Sullivan whether these passengers should be served alcoholic beverages. Ms. Sullivan instructed Mr. Owens to limit the group's alcoholic beverage service to one beer per person and a partial refill of any cocktails already served. As Mr. Owens was following these instructions, he was stopped by Ms. Gee in the aisle. Ms. Gee requested that he not serve the group any more alcoholic beverages because she believed that the group was already intoxicated. Nonetheless, Mr. Owens proceeded to serve one beer each to three members of the group, including Roger Travis and James Scales.

Ms. Gee then approached Mr. Owens at the back of the plane and again requested that he quiet the group. Members of the group, including Mr. Travis, his minor daughter Carly Travis, and Mr. Scales, were aware of Ms. Gee's complaints. Members of the group repeatedly turned around and stared at the Plaintiffs.

At some point during the flight, Ms. Travis took a photograph while standing in the aisle in front of Plaintiffs' rows of seats. Ms. Gee summoned Mr. Owens to complain about the photograph being taken. Ms. Sullivan responded to Ms. Gee's summon, and reprimanded one member of the group for cursing at Ms. Gee.

Upon arriving in Oakland, the other passengers exited the plane. The group, including Mr. Travis, Ms. Travis, and Mr. Scales, remained in the plane. Plaintiffs, still seated behind the group, also remained in the plane. Two Oakland police officers were then summoned to the plane by Ms. Gee's friend and fellow passenger, Julie Yim.

The officers boarded the plane and asked Ms. Gee to identify the individuals who had been harassing her. Ms. Gee identified Ms. Travis, Mr. Travis, and Mr. Scales, and told the officers that these three members of the group had threatened and intimidated the Plaintiffs with racial epithets. The officers detained Mr. Scales, Mr. Travis, and Ms. Travis, identified them, prepared a police report, and then released them.

Ms. Gee registered a complaint with the Federal Aviation Administration. Federal regulations prohibit an airline from boarding passengers who appear to be intoxicated. 14 C.F.R. § 121.575(c). The regulations also prohibit an airline from serving any alcoholic beverage to any person aboard the aircraft if that person appears to be intoxicated. 14 C.F.R. § 121.575(b)(1). Pursuant to Ms. Gee's complaint, the Federal Aviation Administration conducted two separate investigations into charges that Southwest Airlines Co. boarded and served alcohol to intoxicated persons on Flight 824. At the conclusion of each investigation, the Federal Aviation Administration determined that there was insufficient evidence of noncompli-

ance by Southwest. Both investigations were closed with no further action being taken.

Plaintiffs brought an action in state court against Roger Travis, Carly Travis, James Scales, and Southwest. Plaintiffs' complaint alleged federal and state law claims. Plaintiffs alleged six causes of action against Southwest: negligence *per se* for violation of federal regulations; intentional infliction of emotional distress; negligent infliction of emotional distress; *respondeat superior*; negligence; and negligent training and supervision.

Southwest removed the action to federal court on the basis of diversity of citizenship. Southwest moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Southwest asserts that there is no genuine issue as to any material fact and that Southwest is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

DISCUSSION

I. Standard for Granting Summary Judgment.

Summary judgment is properly granted when no genuine and disputed issues of material fact remain; or, when viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Insurance Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. Here, the parties have submitted

a Stipulated Separate Statement of Undisputed Facts. The Court will therefore regard the stipulated facts as being both material and true in ruling upon Southwest's motion. However, the Court must draw all reasonable inferences in favor of the Plaintiffs. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident and Ins. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

II. The Record Reveals No Material Factual Dispute.

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law identifies which facts are material. *Anderson v. Liberty Lobby, Inc.*, 47 U.S. 242, 248 (1986). To a large extent, the parties; Stipulated Separate Statement of Undisputed Facts obviates the Court's inquiry as to whether any genuine and disputed issues of material fact remain.

Having considered the record, and oral argument on the motion, the Court concludes that this action presents no genuine or disputed issues as to material facts. Thus the Court's ruling on the motion must turn upon whether Southwest is entitled to summary judgment as a matter of law.

III. Plaintiffs' State Law Claims Against Southwest Are Preempted By The Airline Deregulation Act.

Southwest contends that Plaintiffs' state law claims are preempted by the Airline Deregulation Act ("ADA") in that they relate "routes, rates, or services." 49 U.S.C. § 1305(a)(1)(1994).[2] Southwest cites *Harris v. American*

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[2] Section 1305(a)(1) pertains to federal preemption of state

(continued...)

Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995), for the proposition that Plaintiffs' state law claims are preempted by Section 1305. The factual distinctions between *Harris* and the instant case are nominal. In *Harris*, the individual defendant made no physically threatening gestures, whereas here the Defendants' statements allegedly included physical threats. *Harris* involved an interstate flight; here, the action arose from an intrastate flight. "The [ADA's] preemption provision preempts states from regulating the *intrastate* activities of any carrier 'having authority under Title IV.'"[3] *Hughes Air Corp. v. Public Util. Comm'n*, 644 F.2d 1334, 1337 (9th Cir. 1981) (citing 49 U.S.C. § 1305(a)(1), emphasis added). As such, Section 1305 clearly applies to Southwest, and Plaintiffs' argument to the contrary is without merit.

Plaintiffs urge the Court to disregard *Harris* on the grounds that it was improperly decided. In arguing that the

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[2](...continued)
law claims against airlines and provides that:

> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. § 1305(a)(1) (Supp. 1994).

[3] "'Air carrier' means any citizen of the United States, who undertakes . . . to engage in air transportation." 49 U.S.C. § 1301(3) (1994).

Ninth Circuit erred in *Harris*. Plaintiffs rely upon two companion cases from the Fifth Circuit which held that state law tort claims arising from in-flight treatment of airline passengers were not preempted by Section 1305(a)(1): *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995); *Smith v. America West Airlines, Inc.*, 44 F.3d 344 (5th Cir. 1995). Neither *Smith* nor *Hodges*, however, is binding on this Court, whereas *Harris* clearly is. "District courts are, of course, bound by the law of their own circuit, and 'are not to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to be.'" *Zuniga v. United Can Co.*, 812 F.2d 443, 450, (9th Cir. 1987) (quoting *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981), *cert. denied* 459 U.S. 828 (1982).

Plaintiffs also contend that their claims are not sufficiently related to "services" to warrant preemption under Section 1305(a)(1). Certain state law claims can be too tenuously connected to "rates, routes or services" to fall within the scope of Section 1305(a)(1). Certain state law claims can be too tenuously connected to "rates, routes or services" to fall within the scope of Section 1305(a)(1). *West v. Northwest Airlines*, 995 F.2d 148, 151 (9th Cir. 1993). However, the Ninth Circuit considered this same argument in *Harris* and rejected it. 55 F.3d at 1474. As in *Harris*, Plaintiffs' allegations fall within the preemptive scope of Section 1305(a)(1).

In seeking summary judgment, Southwest contends that *Harris* is factually and substantively indistinguishable from the instant case. The Court finds this argument persuasive, in that the factual distinctions between *Harris* and the instant case are insignificant. More importantly, *Harris* directly addressed the scope of the ADA's preemption under Section 1305(a)(1), and is binding upon this Court.

Plaintiffs' state law claims against Southwest directly pertain to Southwest's treatment of its passengers. As such, Plaintiffs' state law claims fall within the realm of "services" contemplated by Section 1305(a)(1). The Court therefore concludes that Plaintiffs' state law claims relating to Southwest's treatment of passengers are preempted by Section 1305(a)(1).

IV. The Alleged Violations Of Federal Regulations Do Not Provide The Plaintiffs With A Private Remedy.

Plaintiffs contend that Southwest's alleged violations of federal regulations provide them with a private cause of action. However, a private right of action does not exist unless Congress has demonstrated an unequivocal intent to devise such a right. *See Cort v. Ash*, 422 U.S. 66, 78 (1975).

The Ninth Circuit has addressed the question of whether Section 1305 creates a private right of action and has unequivocally answered in the negative. *Air Transp. Ass'n of Am. v. Public Util. Comm'n of the State of Cal.*, 833 F.2d 200, 207 (9th Cir. 1987); *see also Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir.), *cert. denied*, 479 U.S. 872 (1986). Thus Plaintiffs may not state a private cause of action under Section 1305.

Plaintiffs also attempt to state a private cause of action for Southwest's alleged violations of the Federal Aviation Act and its corresponding regulations. However, the Ninth Circuit has found that the Federal Aviation Act does not provide plaintiffs with an implied private cause of action. *In Re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 407-08 (9th Cir. 1983). In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1413-14 (9th Cir. 1984), the Ninth Circuit did find a private right of action with respect to discrimination in boarding

practices, pursuant to 49 U.S.C. § 1374(b).[4] However, the Ninth Circuit found no implied private cause of action with respect to inadequate service. *Id.* Here, Plaintiffs have not alleged discrimination in boarding and seating. Rather, Plaintiffs' allegations challenge the adequacy of Southwest's services. As such, Plaintiffs allegations do not state a private cause of action under the Federal Aviation Act or its regulations.

Plaintiffs contend that the preemptive scope of Section 1305(a)(1) was narrowed in *American Airlines, Inc. v. Wolens*, _ U.S. __, 115 S.Ct. 817 (1995). *Wolens* created a narrow exception to Section 1305(a)(1) for state law claims arising out of contractual agreements between an airline and a passenger.[5] 115 S.Ct. at 823.

In *Harris*, the Ninth Circuit considered, and rejected, the plaintiff's argument that her claims fell within the *Wolens* exception. 55 F.3d at 1475.[6] "The Court in *Wolens* only excluded private contract terms from the wide scope of preemption, and Harris' claims do not come within this exclusion. Her claims are preempted by [S]ection 1305(a)(1)." *Id.* As such, Plaintiffs claims cannot be deemed to fall within *Wolens*' narrow

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[4] Section 1374 was repealed on July 5, 1994. Pub.L. 103-272, § 7(b).

[5] "A remedy confined to a contract's terms simply holds parties to their agreements -- in this instance, to business judgments an airline made public about its rates and services." *Wolens*, 115 S.Ct. at 823.

[6] "The [*Wolens*] Court specifically distinguished between enforcing a state law and enforcing agreements between individuals and airlines . . . ." *Id.* (citing *Wolens*, 115 S. Ct. at 823).

exception to Section 1305(a)(1).

Plaintiffs' final argument is that they will be left without a remedy against Southwest if the Court adheres to the Supreme Court's interpretation of Section 1305(a)(1) in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). Plaintiffs necessarily concede that in *Morales*, the Supreme Court found a "broad preemptive purpose" in Section 1305(a)(1). 504 U.S. at 383. Nonetheless, Plaintiffs urge the Court to recognize a private right of action. Plaintiffs' arguments are unpersuasive. The reality that a litigant may be left without a remedy or a federal cause of action must not factor into an analysis of the scope of preemption. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987).

V. The Remaining Claims Are Remanded To State Court.

Plaintiffs' original complaint named Southwest and a number of Doe defendants, and contained both federal and state law claims. Southwest removed the action to federal court based upon diversity jurisdiction under 28 U.S.C. 1332. Following Southwest's removal to federal court, Plaintiffs were granted leave to amend their complaint to name Defendants James Scales, Carly Travis, and Roger Travis, all of whom are California residents. Jurisdiction remained in this Court due to the federal questions in the case.

Summary judgment having been granted with respect to all of the federal law claims against Southwest, there is no longer diversity or a federal question and remand is appropriate under 28 U.S.C. § 1447(c). *See also Yniques v. Cabral*, 985 F.2d 1031, 1036 (9th Cir. 1993) (holding that under 28 U.S.C. §1447(e) only remand, not dismissal, is proper after a district court has allowed the joinder of a non-diverse party). Thus, remand of the Plaintiffs' remaining state law claims against Carly

Travis, Roger Travis, and James Scales is appropriate.

CONCLUSION

The Court finds that this case presents no material factual dispute. Likewise, even assuming all of Plaintiffs' factual allegations to be true, and examining the evidence in the light most favorable to Plaintiffs, Plaintiffs' state law claims against Southwest are preempted. Finally, a private cause of action does not lie against Southwest for its alleged violations of federal statutes and regulations.

Having reviewed the papers submitted in support of and in opposition to the motion for summary judgment, and having heard counsel's comments on the motion, and good cause appearing, Southwest's motion for summary judgment is hereby GRANTED with respect to all claims against Southwest. Judgment for Southwest shall enter in accordance with this order; Southwest shall recover its costs of Plaintiffs. Plaintiffs' remaining state law claims against Defendants Roger Travis, Carly Travis, and James Scales are hereby REMANDED to the Superior Court of California, Alameda County.

IT IS SO ORDERED.

Dated: Oct. 31, 1995

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

FILED OCT 31, 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHIRLEY GEE, et al.,

Plaintiffs,

v.

SOUTHWEST AIRLINES, CO., ROGER TRAVIS, JAMES SCALES, and CARLY TRAVIS, and Does 1 through 50 inclusive

Defendants.

No. C-94-3983 CW

JUDGMENT

This action came on for hearing before the Court, the Honorable Claudia Wilken, United States District Judge, presiding, and the issues having been duly heard and the Court having duly rendered its decision,

IT IS HEREBY ORDERED AND ADJUDGED:

That Plaintiffs take nothing, that the action be dismissed on the merits against Defendant Southwest Airlines, and that Defendant Southwest Airlines recover of Plaintiff its costs of action.

Dated: Oct. 31, 1995

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

Entered in Civil Docket Oct 31, 1995

Supreme Court, U.S.
FILED
SEP 12 1997
CLERK

(2)

No. 97-306

In The

Supreme Court of the United States

October Term, 1996

SHIRLEY GEE; RYAN JEFFREY GEE; SEAN PAUL FONG, a minor by and through his guardian ad litem, Shirley Gee; PATRICIA SETO; SAMANTHA SETO; and COREY SETO,

Petitioners,

vs.

SOUTHWEST AIRLINES CO.,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Appropriately taking into account the unique facts involved in this particular case, the question presented by the petition is:

> Does section 105 of the Federal Aviation Act, 49 U.S.C. § 41713(b)(1), preempt emotional injury claims that arise from an airline's allegedly negligent rendition of services that do not involve any issue of aircraft safety, operations, or maintenance?

CORPORATE DISCLOSURE STATEMENT

Respondent Southwest Airlines Co. ("Southwest") has no parent company or nonwholly owned subsidiary.

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SUMMARY OF ARGUMENT

This case presents an issue whose time has clearly not yet come. Depending upon how the law continues to develop, both in the lower courts and the United States Congress, it may never come. In the meantime, and even without regard to the underlying merits, there are five principal reasons why there is no need for this Court to revisit the scope of preemption under the Airline Deregulation Act of 1978 (the "ADA") by granting the petition herein.

First, there is no "split in the circuits" among the United States Courts of Appeals. To the contrary, the only two federal appellate courts that have substantially addressed the issue of ADA preemption – the Fifth and Ninth Circuits – have adopted essentially the same approach. As Judge O'Scannlain noted in his specially concurring opinion below, the rule adopted by the Ninth Circuit is "consistent with the result reached by the only federal appellate court to have yet addressed this issue. . . . " (Pet. App. 20.)[1]

Second, in addition to being consistent in theoretical approach, the Fifth Circuit would likely reach the same result as the Ninth Circuit on the specific facts presented in this case. Indeed, in its decision in *Hodges v. Delta Air Lines*, 44 F.3d 334 (5th Cir. 1995), which fashioned an approach to ADA preemption like the one the Ninth Circuit adopted below, the Fifth Circuit cited its earlier

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[1] In addition, although petitioners sought en banc review in the Ninth Circuit, no judge requested a vote on the suggestion for rehearing en banc. (Pet. App. 5.)

decision in a case involving tort claims by a loud, boisterous, and intoxicated airline passenger as claims that would be preempted as "undeniably related only to the services provided by the airline." This Court denied certiorari in that earlier case.

Third, even if the Court at some point decides to provide additional guidance regarding the scope of ADA preemption, the unique facts in the present case do not present a suitable opportunity to do so. Significantly, this case involves only emotional injury claims, not claims for personal injury or death; there are no "safety" issues involved; and the claims in question do not relate to airline "operations or maintenance." It therefore does not present a close question that would fairly test the scope of ADA preemption or present an appropriate vehicle for further review.

Fourth, the Court has already addressed the preemption issue twice within the past five years in its decisions in *Morales v. Transworld Airlines, Inc.*, 504 U.S. 374 (1992) and *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), respectively. Courts in various jurisdictions are now applying those decisions to specific facts in specific cases to achieve a "closer working out" of the underlying legal principles. That process can and should be allowed to continue before, if ever, this Court finds it necessary to address the preemption issue yet again.

Finally, in 1994, Congress slightly modified the language of the ADA's preemption provision, but made it clear that it "did not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83

(1994). If at some point Congress takes a different view, it can and will enact appropriate legislation. At present, however, there is no need for this Court to intervene.

ARGUMENT

I.

THE RULE ADOPTED BY THE NINTH CIRCUIT BELOW IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS AND THE RESULT REACHED BY THE ONLY OTHER FEDERAL COURT TO HAVE ADDRESSED THE ISSUE

In its decision below, the Ninth Circuit adopted an approach to ADA preemption that is fully consistent with this Court's decisions in *Morales* and *Wolens*, as well as *New York State Conf. of Blue Cross and Blue Shield v. Travelers Ins. Co.*, 115 S.Ct. 1671 (1995). In this regard, the Ninth Circuit construed those cases as indicating that section 105 of the ADA should not be extended to preempt safety-related personal injury or death claims arising from the operation and maintenance of an aircraft, as opposed to emotional injury claims stemming only from the negligent rendition of service by an airline. It observed that a distinction between "services" and "operations and maintenance" was also mandated by a provision in the ADA (49 U.S.C. § 1371(q)(1)), which requires airlines to obtain insurance, or self insure, to pay for "bodily injuries to or the death of any person" resulting from the "operation or maintenance of aircraft. . . . " (Pet. App. 14-15.)

Moreover, the Ninth Circuit noted that adopting an approach to preemption based upon this distinction is "harmonious with the results reached in other circuit and district courts," principally the Fifth Circuit's en banc decisions in *Hodges v. Delta Air Lines*, 44 F.3d 334 (5th Cir. 1995) and *Smith v. America West Airlines, Inc.*, 44 F.3d 344 (5th Cir. 1995). (Pet. App. 15-16.) In those two cases, the Fifth Circuit likewise analyzed this Court's previous decisions as authority for distinguishing between tort claims that arise out of the "operation and maintenance of aircraft" (which are not preempted) and those arising out of other, nonsafety-related services provided by an airline (which are preempted). This, of course, is the same approach that the Ninth Circuit has now adopted; and no other circuit has taken a contrary position.

Accordingly, as Judge O'Scannlain noted in his specially concurring opinion below, the rule adopted by the Ninth Circuit in the present case is "consistent with the result reached by the only federal appellate court to have yet addressed the issue [the Fifth Circuit in *Hodges v. Delta Air Lines, supra*]." (Pet. App. 20.) Under these circumstances, and particularly in light of the additional reasons discussed below, there is no need or justification for this Court to grant the petition in the present case.

II.

IN ADDITION TO BEING CONSISTENT IN THEORETICAL APPROACH, THE FIFTH CIRCUIT WOULD ALSO LIKELY REACH THE SAME RESULT ON THE SPECIFIC FACTS AT ISSUE IN THIS CASE

Petitioners claim that Southwest was negligent in protecting petitioners against the actions of other passengers, who allegedly subjected petitioners to a steady

stream of "insults, threats, intimidation, profanity, harassment, and racial slurs that continued for the entire flight." (Pet. App. 3-4.) The Ninth Circuit held that all such claims were preempted, following its earlier decision in *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995) and applying the distinction between claims arising out of the "operation and maintenance" of aircraft versus the "negligent rendition of service" described above.

Likewise, in *Hodges, supra,* the Fifth Circuit cited its earlier decision in *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989), as an example of a case that involved claims that were preempted because they "undeniably related only to the services provided by the airline," not any "safety-related tort duty." *Hodges, supra,* 44 F.3d at 339. In *O'Carroll*, the defendant airline removed the plaintiff and his cousin from a flight because they were loud, boisterous, and intoxicated. The plaintiff prevailed at trial on tort claims that he was wrongfully evicted from the flight. On appeal, the Fifth Circuit reversed and held that all of the plaintiff's state law claims were preempted under the ADA.

In *Hodges*, the Fifth Circuit observed that enforcement of O'Carroll's state law claims would have resulted in significant de facto regulation of the airline's boarding practices and interfered with federal law granting the airline substantial discretion to refuse to carry passengers. 44 F.3d at 339. The same conclusion is appropriate, for the same reason on similar facts, in the present case. This Court denied certiorari in *O'Carroll* and should also deny the petition in the present case.

III.

THE UNIQUE FACTS OF THIS CASE ALSO DO NOT PRESENT A SUITABLE VEHICLE FOR CLARIFYING THE SCOPE OF ADA PREEMPTION

In addition, even if the Court were otherwise inclined to revisit the issue of preemption under the ADA, this case does not present an appropriate vehicle for doing so. By any standard and applying any distinction, the claims in the present case are preempted. This dispute thus does not present a close question that would fairly test the scope of ADA preemption or provide an appropriate vehicle for further review. Importantly, this case does not involve claims for bodily injury. Instead, only emotional distress claims are involved. Moreover, the claims do not even arguably involve claims arising out of the "operations and maintenance" of an aircraft; nor are there any colorable "safety-related" claims involved.

On the contrary, the facts in the present case are classic examples of the type of claims that, under any analysis, would be preempted. Such claims, which involve not only the scope of state civil rights statutes but also conduct specifically governed by federal statutes and regulations, also present a perfect example of why preemption under the ADA must be construed broadly. Otherwise, airlines like Southwest would be subject to the varying, and sometimes conflicting, statutes and common law among the 50 states; and there would be no uniform regulation of conduct that would otherwise be subject to federal regulations, i.e., regulations that deal with serving alcohol to persons on an airline who appear to be intoxicated, or boarding practices which preclude the boarding

of any person who appears to be intoxicated, or regulations requiring airlines to provide safe and adequate service to air travelers. In all of these areas, uniformity is an absolute essential and the very purpose of the ADA's preemption provision.

Accordingly, regardless of whether this Court might at some later point deem some other case on other facts to be worthy of review, it should deny the petition in the present case.

IV.

THIS COURT HAS ALREADY ADDRESSED THE PREEMPTION ISSUE TWICE WITHIN THE PAST FIVE YEARS AND SHOULD NOW ALLOW OTHER COURTS TO ACHIEVE A "CLOSER WORKING OUT" OF THE UNDERLYING LEGAL PRINCIPLES

There is another reason why the Court should deny the petition: it has already addressed the issue of ADA preemption twice within the past five years in its decisions in *Morales* and *Wolens* in 1992 and 1995, respectively. Courts in various jurisdictions throughout the United States are now implementing this Court's decisions in those cases to other disputes in other cases arising out of a wide variety of different fact situations. That is precisely how our federal system of adjudication is supposed to work, as this Court should thus have the benefit of this fuller development of legal principles in specific cases before again addressing the preemption issue.

As this Court noted in *Wolens*, legal principles seldom can be settled "on the basis of one or two cases, but

require a closer working out." *Wolens, supra*, 513 U.S. at 234-35, citing Pound, *Survey of the Conference Problems*, 14 U.Cin. L.Rev. 324, 339 (1940) (Conference on the Status of the Rule of Judicial Precedent). That process should be allowed to continue in the lower courts, thus obtaining the benefit of applying the ADA's preemption in a greater array of specific factual settings, before, if ever, this Court again finds it necessary to address the issue.

V.

FURTHER REVIEW IS ALSO NOT NECESSARY BECAUSE CONGRESS HAS MADE IT CLEAR THAT IT "DID NOT INTEND TO ALTER THE BROAD PREEMPTION INTERPRETATION" ADOPTED BY THIS COURT IN *MORALES*

In *Morales, supra*, this Court adopted a broad interpretation of preemption under the ADA, holding that the Act's broad preemptive purpose is apparent from the ordinary meaning of the statutory language, as well as from the Court's earlier decisions construing similar language under ERISA. In reaching this conclusion, the Court rejected arguments that a narrower interpretation should be adopted because of differences between the overall statutory scheme under the ADA, as compared with ERISA, or because of the so-called "savings clause" in the ADA. *See* 49 U.S.C. at § 506. The Court also rejected the argument that the ADA's preemption clause only prohibited the states from actually prescribing rates, routes, or services, or only preempted state laws specifically addressed to the airline industry.

The Court in *Morales* did caution that certain state actions were "too tenuous, remote, or peripheral" to have

a preemptive effect, using as examples state laws against gambling and prostitution as applied to airlines. *Morales*, 504 U.S. at 390. In that case, however, as in the present case, no "borderline question" of this extreme type was presented; and there is no question that this Court otherwise gave an expansive interpretation to preemption under the ADA.

Significantly, as Justice O'Connor noted in her opinion concurring and dissenting in part in *Wolens*, after this Court's decision in *Morales*, Congress revisited the preemption issue and said that it "'[d]id not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*,' HR Conf Rep No. 103-677, at 83 (1994)." *Wolens*, 513 U.S. at 246. Particularly under these circumstances indicating Congress' apparent approval of a very broad preemption interpretation, there is no need for this Court to revisit the issue as well.

Ultimately, the expansive interpretation of preemption this Court adopted in *Morales* and *Wolens* rests upon considerations of public policy. But efforts to make changes on policy issues should in most cases be addressed to Congress, not the federal courts. *See, e.g., Federal Communications Commission v. Beech Communications, Inc.*, 508 U.S. 307, 315-16 (1993) (Constitution does not grant courts license to judge the wisdom, fairness, or logic of legislative choices). *See also In re Pederson*, 875 F.2d 781 (9th Cir. 1989) (federal courts without authority to second guess policy judgments made by the political branches of the government); and *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir. 1989) (federal courts should defer to judgment of Congress on policy issues).

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Dated: September 12, 1997

Respectfully submitted,

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No. 97-306

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

SHIRLEY GEE; RYAN JEFFREY GEE; SEAN PAUL FONG, a minor by and through his guardian *ad litem*, Shirley Gee; PATRICIA SETO; SAMANTHA SETO; and COREY SETO,
Petitioners,

v.

SOUTHWEST AIRLINES CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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H.R. Conf. Rep. No. 103-677, 103d Cong., 2d Sess. (1994) 6

REPLY TO BRIEF IN OPPOSITION

Southwest's Brief in Opposition urges that review be denied on a number of predictable grounds, but its arguments underscore the current disarray in this area of the law and also demonstrate why this case is a good vehicle to resolve the largest remaining legal issue about the preemptive scope of section 105 of the Federal Aviation Act.

1. Southwest begins by asserting that there is no conflict between the Ninth Circuit's decision here and the Fifth Circuit's decision in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 335 (1995) (*in banc*), arguing that these two courts have taken "essentially the same approach" in analyzing the preemptive effect of section 105. Brief in Opposition at 1; *see also id.* at 3-4. Southwest's focus is too narrow, and its argument fails in two respects.

First, Southwest never mentions the fact that the Ninth Circuit's decisions here and in *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (1995), cannot be squared with the Texas Supreme Court's decision in *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274 (1996), not to mention the California Court of Appeal's decision in *Romano v. American Trans Air*, 56 Cal. Rptr. 2d 428 (2d App. Dist. 1996).

The Texas Supreme Court's *Kiefer* decision is important because it flatly rejected a key distinction that the Ninth Circuit made here, namely, that bodily injury claims are to be analyzed differently from claims of emotional injury, with the latter preempted, but not the former (Pet. App. 14). One of the two cases consolidated in *Kiefer* alleged that the airline was negligent when it failed to provide "meet-and-assist" service to a disabled passenger who was changing planes; the passenger became mentally disoriented, wound up in an airport parking lot, and was jailed after getting into an altercation with police. 920 S.W.2d at 275-76. Under the Ninth Circuit's approach here and in *Harris*, this claim would be preempted on the ground that it "relates to" an airline's meet-and-assist "service," which cannot be categorized as part of the "operation and maintenance" of an

aircraft. But that is not the course the Texas Supreme Court took. Instead, *Kiefer* found no preemption of this tort claim, seeing "no difference" between a "claim of injury caused by an article falling from an overhead compartment and a claim of injury caused by an airline agent's mishandling of a wheelchair in meeting or assisting a passenger." *Id.* at 284.

The Ninth Circuit's decisions here and in *Harris* thus cannot be reconciled with *Kiefer*, and Southwest is simply wrong in asserting that petitioners' tort claims in this case would be preempted "under any analysis." Brief in Opposition at 6.

Second, Southwest's exclusive focus on *Hodges* ignores the conflict between this case and *Harris*, on the one hand, and, *Hodges'* companion case, *Smith v. America West Airlines, Inc.*, 44 F.3d 344 (5th Cir. 1995)(*in banc*), on the other.

Smith (like this case) did not involve a bodily injury claim, but claims of emotional injuries based on the airline's alleged failure to prevent the boarding of a "visibly deranged" passenger who proceeded to hijack the aircraft. 44 F.3d at 347. The Fifth Circuit found no preemption, explaining that the Airline Deregulation Act sought to deregulate airline economics; thus, a tort claim involving an airline's boarding practices or "services" would be preempted if the plaintiffs challenged an airline's economic decisions, such as whether to overbook its flights. Because *Smith* presented no such challenge, the passengers' claim was allowed to proceed, even though the Fifth Circuit acknowledged that a damages award "could affect the airline's ticket selling, training or security practices." *Id.*

Smith is "on all fours" with *Harris*, as the dissenting judge argued forcefully in *Harris*, 55 F.3d at 1478 (Norris, J., dissenting), and Southwest's focus on *Hodges* cannot obscure the irreconcilable conflict with *Smith*. Both here and in *Harris*, the passenger's suit was "based upon the flight crew's failure to protect her from [other passengers'] abusive behavior and for exacerbating the known risk of emotional and physical injury by

serving [the other passengers] more alcohol." *Id.* Under *Smith*'s analysis, section 105 would preempt claims "relating to" the "service" of beverages only if the claim affected the airline's "economic decisions" about whether to offer drinks on a flight or at what price, if any. A damages recovery in *Harris* or the present case might "affect the airline's training or security practices regarding how to protect passengers from harassment, but it would not regulate the economic or contractual aspects of the airline's provision of beverages." *Id.*

Southwest correctly observes that the majority opinion here did cite *Hodges* and *Smith*, but these citations were limited to the proposition that a distinction exists between airline services and operations. Brief in Opposition at 4, citing Pet App. 15-16. Two paragraphs earlier, the majority made clear its view that "[e]motional injury claims" are "quite different from safety-related personal injury or death claims concerning airline operations or maintenance" (Pet. App. 14). Reading that opinion in tandem with *Harris* and *Smith*, it becomes clear that "emotional injury claims" are preempted in the Ninth Circuit, but not in the Fifth Circuit. Southwest thus errs in its denial that a conflict exists, as well as its more extravagant claim that the Fifth Circuit would likely come out the same way on the facts presented here and in *Harris*. Brief in Opposition at 4-5.

2. Nor is Southwest on firmer ground when it argues that this case has "unique" facts, which make it unsuitable for resolving issues about the preemptive scope of section 105. Brief in Opposition at 6-7.

At the outset, the factual similarities between this case and *Harris* suggest, unfortunately, that petitioners' experience was not unique. Also, as our petition noted (at 18 n.5), airlines have lately been coping with an increase in abusive conduct by rowdy passengers that is directed against both passengers and crew.

More broadly, the factual setting here is no more "unique" than were the facts in *Morales v. Trans World Airlines, Inc.*,

504 U.S. 374 (1992), or *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). *Morales* addressed a first-of-its-kind effort by state attorneys general to enforce consumer protection laws against airlines under a set of enforcement guidelines. *Wolens* was the only reported case where a passenger challenged an airline's effort to change frequent flier eligibility retroactively.

In similar fashion, this case presents a useful vehicle to resolve questions about the effect of section 105 on various tort claims that do not involve bodily injury. Southwest suggests that the lack of a bodily injury claim argues against granting review, Brief in Opposition at 6, but this is an odd position to take, given that the courts are apparently unanimous in rejecting a preemption defense in bodily injury cases, a point made by the California Court of Appeal after surveying the case law in *Romano*. 56 Cal. Rptr. 2d at 431.

By contrast, tort claims that do *not* involve bodily injury represent the one remaining area of section 105 jurisprudence where the courts are badly divided. The point is illustrated by this case, *Harris, Smith, Kiefer* and *Romano* -- and those are only the appellate decisions. There have also been disparate results in the federal district courts, although most of them, even after *Morales*, "have found broad preemption inappropriate in 'services' cases" where tort claims are alleged. *Sedigh v. Delta Airlines, Inc.*, 850 F. Supp. 197, 201 (E.D.N.Y. 1994)(finding no preemption of claims for assault, intentional infliction of emotional distress, false imprisonment); *accord Diaz Aguasviva v. Iberia Lineas Aereas de Espana*, 902 F. Supp. 314, 318-19 (D.P.R. 1995) (surveying case law and finding no preemption in most non-bodily injury cases).

To be sure, the precise legal question in this case is not whether non-bodily injury claims generically are preempted, but whether section 105 preempts the specific torts of negligence, emotional or intentional infliction of emotional distress and the like that are alleged in petitioners' complaint. Nonetheless,

Wolens was similarly limited to the precise breach of contract claim presented by the facts there, yet the Court's opinion has provided clear guidance to courts and litigants and has dramatically reduced litigation over preemption issues in contract cases.

The major issue remaining after *Wolens* is the effect of section 105 on various state tort claims, particularly when no bodily injury has occurred. As the plethora of tort litigation in this area suggests, the issue is not likely to go away, and a ruling by the Court on the merits (whatever the result may be) will do much to bring closure to this area of preemption jurisprudence.

Contrary to Southwest's suggestion, no useful purpose would be served by letting the issue percolate for further consideration in light of *Morales* and *Wolens*. Brief in Opposition at 7-9. In the first place, neither of those cases involved tort claims. Moreover, the Fifth Circuit's rulings in *Hodges* and *Smith* were issued in 1995 by the *in banc* court and are thus unlikely to be reconsidered. The Ninth Circuit was well aware of *Wolens*, as well as *Hodges* and *Smith*, when it decided *Harris*, but was content to adopt an approach to "services" preemption at odds with that of the Fifth Circuit. With the subsequent decisions in *Kiefer* and *Romano*, the split has become even more pronounced. Indeed, Judge O'Scannlain here urged his colleagues to "set our own house in order" (Pet. App. 24). Despite that plea, rehearing *in banc* was rejected, thus leaving *Harris* and this case as the controlling federal precedents in the nine states comprising the Ninth Circuit.

Southwest's willingness to tolerate this tension in the law is curious. Southwest is based in Texas and operates many flights between points in the Fifth and Ninth Circuits, including (for example) non-stops between Dallas and Las Vegas, San Antonio and Los Angeles, and El Paso and Phoenix. Should an incident arise on any of these flights, Southwest's amenability to a state tort claim would depend on whether the passenger files suit in the city where the flight originated or where it arrived and

(possibly) whether the case is tried in state or federal court. That is not a desirable state of events in an industry that operates largely on an interstate basis, but that situation will remain in effect for the foreseeable future if review is denied.

3. The foregoing discussion relates to the point in our petition about the need for granting review in order to determine whether petitioners' tort claims regulate airline "services" in a way that section 105 forbids. Southwest's final argument addresses our related point about the need to review the scope of section 105's "relating to"/"relates to" language in light of the Court's recent ERISA cases. Brief in Opposition at 8-9.

Southwest does not dispute that this Court has refined its ERISA preemption analysis, but treats this development as irrelevant, relying on a single sentence in the conference report accompanying the 1994 recodification of the Federal Aviation Act to the effect that Congress did "not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, 103d Cong., 2d Sess. 83 (1994), cited in Brief in Opposition at 9.

One answer to this, which Southwest seems to acknowledge, is that this bit of history did not dissuade the Court from finding no preemption in *Wolens*, using *Morales* as the point of departure. In any event, Southwest's citation of this history underscores the need for granting review. The Court's recent ERISA cases did not overrule past precedents, but clarified the need to construe state laws in light of statutory purposes and the traditional presumption against preemption. *Morales* anchored its analysis of section 105's "relating to" language in this Court's ERISA cases, and whether section 105 should continue to be construed using ERISA preemption principles is an important issue that only this Court can decide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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